INDEX

	Page
Opinion below	2
Jurisdiction	2
Questions presented	3
Constitutional provisions, statutes, rule, and regulations involved	4
Statement	5
Reasons for granting the writ	9
Conclusion	13
Appendix A	15
Appendix B	24
Appendix C	39
Appendix D	47

CITATIONS

Cases:	
Berger v. *United States*, 295 U.S. 78	8
Bowman Dairy Co. v. *United States*, 341 U.S. 214	9
Environmental Protection Agency v. *Mink*, 410 U.S. 73	9
Gay v. *Ruff*, 292 U.S. 25	2
Marbury v. *Madison*, 1 Cranch 137	9
Nader v. *Bork*, 366 F. Supp. 104 (D.D.C. 1973)	8
Nixon v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973)	2, 8, 9, 10, 12
Sunshine Anthracite Coal Co. v. *Adkins*, 310 U.S. 381	10
United States v. *Andreas*, —— F. Supp. —— (D. Minn. No. 4–73–Cr. 201)	8
United States v. *Burr*, 25 Fed. Cas. 30 (No. 14, 692d) (C.C.D. Va. 1807)	9
United States v. *Ehrlichman*, —— F. Supp. ——, (D.D.C. Crim. No. 74–116)	8
United States v. *Mitchell et al.* (D.D.C. Crim. No. 74–110)	2, 11
United States v. *Reynolds*, 345 U.S. 1	10
United States v. *United Mine Workers*, 330 U.S. 258	3
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579	3, 10

548-530—74——1

Constitution and Statutes:

	Page
Article II, Section 1	24
Article II, Section 2	24
Article II, Section 3	25
Article III, Section 2	25
5 U.S.C. 301	25
28 U.S.C. 509	26
28 U.S.C. 510	1, 26
28 U.S.C. 515	24
28 U.S.C. 516	27
28 U.S.C. 517	1, 27
28 U.S.C. 518	1, 27
28 U.S.C. 519	27
28 U.S.C. 1254(c)	3
28 U.S.C. 1291	2
28 U.S.C. 1651	2
28 U.S.C. 2101(e)	3
Rules and Regulations:	
Rule 20, Supreme Court Rules	20
Rule 17, Federal Rules of Criminal Procedure	4, 5, 9, 28
Department of Justice Order No. 551-73	1, 29
Department of Justice Order No. 554-73	35

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, ET AL., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND SUGGESTION FOR EXPEDITED SCHEDULE

The Special Prosecutor, on behalf of the United States, petitions for a writ of certiorari before judgment to the United States Court of Appeals for the District of Columbia Circuit.[1]

If the petition is granted, the Special Prosecutor suggests, in view of the imperative public importance that the issues herein be resolved during the present Term of the Court, that the Court expedite the sched-

[1] Under 28 U.S.C. 510, 517, and 518, and Department of Justice Order No. 551-73, 28 C.F.R. § 0.37 *et seq.* (App. B, pp. 26-34, *infra*), the Special Prosecutor has authority, in lieu of the Solicitor General, to conduct litigation before this Court on behalf of the United States in cases within his jurisdiction.

ule for briefing and argument. In this regard, the Special Prosecutor would suggest that the brief for petitioner be filed on June 7, 1974, and any briefs for respondents on June 7, 1974—all briefs to be filed initially in typewritten form, but to be replaced as soon as possible with printed briefs. The Special Prosecutor further would suggest that the Court hear argument in this case as soon after the filing of briefs as is consistent with the Court's calendar.

OPINION BELOW

The district court's opinion and order of May 20, 1974, denying the motion to quash the subpoena and enforcing compliance with it (Appendix A, *infra*, pp. 15–23) are not yet officially reported.

JURISDICTION

The order of the district court sought to be reviewed was entered on May 20, 1974, in *United States* v. *Mitchell, et al.* (D.D.C. Crim. No. 74–110). On May 24, 1974, respondent Richard M. Nixon, President of the United States, filed a timely notice of appeal from that order in the district court,[2] and that same day the certified record from the district court was docketed in the United States Court of Appeals for the District of Columbia Circuit (No. 74-1534). The jurisdiction of

[2] In *Nixon* v. *Sirica*, 487 F. 2d 700, 707 n.21 (D.C. Cir. 1973), the court of appeals stated that an order of this type directed to the President is appealable under 28 U.S.C. 1291. In any event, the court of appeals has jurisdiction pursuant to the All Writs Act, 28 U.S.C. 1651. See 487 F. 2d at 706–707.

On May 24, 1974, the President also filed a petition for a writ of mandamus in the court below seeking review of the district court's order in this additional way. This case is docketed as D.C. Cir. No. 74–1532.

this Court to review the instant case, which is now pending in the court of appeals (see *Gay* v. *Ruff*, 292 U.S. 25, 30), is invoked under 28 U.S.C. 1254(1) and 2101(e). See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579; *United States* v. *United Mine Workers*, 330 U.S. 258, 269. In both *Youngstown Sheet & Tube Co.* v. *Sawyer* and *United States* v. *United Mine Workers*, a writ of certiorari was granted before final judgment in the court of appeals at the instance of the party that had prevailed in the district court.

QUESTIONS PRESENTED

1. Whether the President, when he has assumed sole personal and physical control over evidence demonstrably material to the trial of charges of obstruction of justice in a federal court, is subject to a judicial order directing compliance with a subpoena *duces tecum* issued on the application of the Special Prosecutor in the name of the United States.

2. Whether a federal court is bound by the assertion by the President of an absolute "executive privilege" to withhold demonstrably material evidence from the trial of charges of obstruction of justice by his own White House aides and party leaders, upon the ground that he deems production to be against the public interest.

3. Whether a claim of executive privilege based on the generalized interest in the confidentiality of government deliberations can block the prosecution's access to evidence material and important to the trial of charges of criminal misconduct by high government officials who participated in those deliberations, particularly where there is a *prima facie* showing

that the deliberations occurred in the course of the criminal conspiracy charged in the indictment.

4. Whether any executive privilege that otherwise might have been applicable to discussions in the offices of the President concerning the Watergate matter has been waived by previous testimony pursuant to the President's approval and by the President's public release of 1,216 pages of edited transcript of forty-three Presidential conversations relating to Watergate.

5. Whether the district court properly determined that a subpoena *duces tecum* issued to the President satisfies the standards of Rule 17(c) of the Federal Rules of Criminal Procedure because an adequate showing has been made that the subpoenaed items are relevant to issues to be tried and will be admissible in evidence.

CONSTITUTIONAL PROVISIONS, STATUTES, RULE, AND REGULATIONS INVOLVED

The constitutional provisions, statutes, rule and regulations involved, which are set forth in Appendix B, *infra*, pp. 24–38, are:

Constitution of the United States:
- Article II, Section 1
- Article II, Section 2
- Article II, Section 3
- Article III, Section 2

Statutes of the United States:
- 5 U.S.C. 301
- 28 U.S.C. 509, 510, 515–519

Rule:
- Rule 17(c), Federal Rules of Criminal Procedure

Regulations:
- Department of Justice Order No. 551–73 (November 2, 1973), 38 Fed. Reg. 30,738, adding 28 C.F.R. §§ 0.37, 0.38, and Appendix to Subpart G–1
- Department of Justice Order No. 554–73 (November 19, 1973), 38 Fed. Reg. 32,805, amending 28 C.F.R. Appendix to Subpart G–1

STATEMENT

This case presents for review the denial of a motion filed on behalf of respondent Richard M. Nixon, President of the United States, pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure, seeking to quash a subpoena *duces tecum* issued in a criminal case, directing the President to produce "tapes and other electronic and/or mechanical recordings and reproductions, and any memoranda, papers, transcripts, and other writings" relating to sixty-four specifically described conversations (Appendix C, *infra*, pp. 39–46).

1. On March 1, 1974, a grand jury of the United States District Court for the District of Columbia returned an indictment charging respondents John N. Mitchell, H. R. Haldeman, John D. Ehrlichman, Charles W. Colson, Robert C. Mardian, Kenneth W. Parkinson and Gordon Strachan with various offenses relating to the Watergate matter, including a con-

spiracy to defraud the United States and to obstruct justice.[3] The subpoena *duces tecum* in question was issued by the district court on April 18, 1974, upon the motion of the Special Prosecutor as Attorney for the United States and was made returnable on May 2, 1974. (Appendix D, *infra,* pp. 47–48). The subpoena called for production of the evidence in advance of the September 9, 1974 trial date in order to allow time for any litigation over the subpoena and for transcription and authentication of any tape recordings produced. Several defendants joined in the subpoena.

On May 1, 1974, President Nixon, through his White House counsel, filed a "special appearance" and motion to quash the subpoena. Subsequent proceedings, at the joint suggestion of counsel for the President and the Special Prosecutor and with the approval of counsel for the defendants, were held *in camera* because of some especially sensitive matters submitted to the district court by the Special Prosecutor in opposition to the motion to quash. Although only defendants Colson, Mardian and Strachan formally joined in the Special Prosecutor's motion for

[3] At some or all of the times in question, respondent Mitchell, a former Attorney General of the United States, was Chairman of the Committee for the Re-election of the President. Respondent Haldeman was Assistant to the President and chief of staff. Respondent Ehrlichman was Assistant to the President for Domestic Affairs. Respondent Colson was Counsel to the President. Respondent Mardian, a former Assistant Attorney General, was an official of the President's re-election campaign. Respondent Parkinson was an attorney for the re-election committee. And respondent Strachan was Staff Assistant to the President.

issuance of the subpoena, all seven defendants (respondents herein) argued in opposition to the motion to quash at the hearing in the district court. At that hearing, further motions to expunge and for protective orders, relating to the information submitted by the Special Prosecutor, were filed or raised orally by counsel for the President.

2. In its opinion and order of May 20, 1974, the district court denied the motion to quash and the motions to expunge and for protective orders. It further ordered "the President or any subordinate officer, official or employee with custody or control of the documents or objects subpoenaed" to deliver to the court on or before May 31, 1974, the originals of all subpoenaed items as well as an index and analysis of those items, together with tape copies of those portions of the subpoenaed recordings for which transcripts had been released to the public by the President on April 30, 1974. The district court stayed its order pending appellate review on the condition that appellate review was sought before 4:00 p.m. on May 24, 1974, and further provided that matters filed under seal remain under seal when transmitted as part of the record.

In requiring compliance with the subpoena *duces tecum,* the district court rejected the contention by counsel for the President that it had no jurisdiction because the proceeding allegedly involved solely an intra-executive dispute. The court ruled that this argument lacked substance in light of jurisdictional responsibilities and independence with which the Special Prosecutor has been vested by regulations that have

548-530—74——2

the force and effect of law and that had received the explicit concurrence of the President.[4] The court emphasized the "unique guarantee of unfettered operation" given to the Special Prosecutor and noted that under these regulations, as amended and explained by the Acting Attorney General (App. B, *infra*, pp. 37–38), the Special Prosecutor's jurisdiction, which includes express authority to contest claims of executive privilege, cannot be limited without the President's first consulting with the leaders of both Houses of Congress and the respective Committees on the Judiciary and securing their consensus. In these circumstances, the court found that there exists sufficient independence to provide the court with a concrete legal controversy between adverse parties and not simply an intra-agency dispute over policy.[5]

On the merits, and relying on the *en banc* decision in *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973), the district court held that in the circumstances of this case, the courts, and not the President, are the final

[4] The validity of these regulations establishing the authority of the Special Prosecutor has been upheld in three other cases, in addition to the decision below. See *Nader* v. *Bork*, 366 F. Supp. 104 (D.D.C. 1973); *United States* v. *Ehrlichman*, —— F. Supp. —— (D.D.C. Crim. No. 74-116) (May 21, 1974); *United States* v. *Andreas*, —— F. Supp. —— (D. Minn. No. 4-73-Cr. 201) (March 12, 1974).

The regulations are reprinted in Appendix B, *infra*, pp. 29–38.

[5] The court later held that as the recipient of a subpoena in this criminal case, the President "as a practical matter, is a third party" (Appendix A, *infra*, p. 19).

As this Court noted in *Berger* v. *United States*, 295 U.S. 78, 88, the prosecuting attorney in a federal criminal case represents the United States as a sovereign government.

arbiter of the applicability of a claim of executive privilege for the subpoenaed items. Here, the court ruled, the presumptive privilege for documents and materials reflecting executive deliberations was overcome by the Special Prosecutor's *prima facie* showing that the items are relevant and important to the issues to be tried in the Watergate cover-up case and that they will be admissible in evidence.[6]

Finally, the district court held that the Special Prosecutor, in his memorandum and appendix below, satisfied the requirements of Rule 17(c) that the subpoenaed items be relevant and evidentiary. See *Bowman Dairy Co.* v. *United States*, 341 U.S. 214.

3. The President has sought review of this decision in the court of appeals and the Special Prosecutor, on behalf of the United States, seeks certiorari before judgment.

REASONS FOR GRANTING THE WRIT

1. It is the position of the Special Prosecutor that the decision of the district court, relying on *Nixon* v. *Sirica, supra*, is fully in accord with constitutional principles first enunciated in *Marbury* v. *Madison*, 1 Cranch 137, and *United States* v. *Burr*, 25 Fed. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807), and repeatedly reaffirmed by this Court, as recently as the decision in *Environmental Protection Agency* v. *Mink*, 410 U.S.

[6] As to the claims by defendants that they are entitled to the subpoenaed items under Rule 17(c), the court withheld ruling, stating that defendants' requests for access will be more appropriately considered in conjunction with their pretrial discovery motions.

73. See also *United States* v. *Reynolds*, 345 U.S. 1; *Youngstown Sheet & Tube Co.* v. *Sawyer, supra.* We believe these authorities support the principle that the President is amenable to judicial orders directing the performance of legal duties. Furthermore, we submit that they also demonstrate that, when a claim of executive privilege is interposed in a lawsuit, the courts have the ultimate power to decide whether that privilege has been properly invoked and whether, under all the circumstances, it should be accepted. The Executive's determination is not conclusive.'

Nevertheless, the constitutional issues involved in this case are exceedingly important, both in their own right and in the context of the litigation in which they arise. The case involves basic constitutional issues arising out of the doctrine of the separation of powers and the powers of the Judiciary and the prerogatives of the Chief Executive. Perhaps more fundamentally, this case also presents a question of overriding concern to the full and impartial administration of justice—is our constitutional system of government sufficiently resilient to permit the Executive Branch to establish an independent prosecutor fully capable of investigating and prosecuting allegations of criminal misconduct by officials in the Executive Office of the President, and validly authorized to

[1] It is possible that the President is now foreclosed from contesting in this case the issues finally decided in *Nixon* v. *Sirica, supra*, a related proceeding between essentially the same parties. See, *e.g.*, *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 402–404.

resort to the judicial process to secure physical evidence from the President himself.

Whether the President is amenable to the judicial process, whether the President or the courts have the ultimate authority to determine the applicability of "executive privilege" to material evidence for judicial proceedings, whether executive privilege can be invoked in the face of a *prima facie* showing that the conversations at issue involved a criminal enterprise, whether any confidentiality privilege for Watergate-related conversations has been irretrievably waived by the President, and whether the President has been properly ordered to comply with the instant subpoena—are all issues worthy of review by this Court.

2. Moreover, it is of imperative public importance that this case be resolved as quickly as possible to permit the trial in the "Watergate cover-up case," *United States* v. *Mitchell, et al.*, to proceed as scheduled on September 9, 1974. If the decision below were to proceed through normal appellate processes, it is likely that there would be no final decision in the court of appeals prior to the end of the current Term of this Court. Assuming that this Court thereafter were not to convene a Special Term to hear this case, the case then could not be heard and disposed of by this Court until the late Fall of this year. Accordingly, the trial could not proceed until the spring of 1975, particularly if the district court's decision is upheld and the district court must conduct *in camera* proceedings to determine which items, if any, are to

be produced to the government or defense. In addition, the trial would have to await the transcription of any recordings produced for use at trial. All in all, at a minimum there would be a delay of six months in the start of the trial.

Immediate consideration of the case by this Court during the present Term would not sacrifice any benefits of intermediate appellate review. The Court of Appeals for the District of Columbia Circuit previously has considered and ruled at length on the principal constitutional issues presented for review by this petition. See *Nixon* v. *Sirica, supra.* Indeed, in his Memorandum in Support of the President's Motion to Quash Subpoena Duces Tecum filed in the district court, counsel for the President stated (pp. 1–2): "We recognize that at the present stage of this case these [constitutional] contentions are foreclosed by the decision in *Nixon* v. *Sirica,* —— U.S. App. D.C. ——, 487 F. 2d 700 (1973). Thus we do not now press these points, but mention them here in order that they may be preserved should it be necessary for this case to reach a court in which *Nixon* v. *Sirica* is not controlling precedent."

Thus, this case satisfies the standards of Rule 20 of this Court's rules for granting certiorari before judgment as those standards have been articulated in the cases therein cited.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the case set for briefing and argument this Term.

Respectfully submitted.

LEON JAWORSKI,
Special Prosecutor.
PHILIP A. LACOVARA,
Counsel to the Special Prosecutor.
JAMES F. NEAL,
Special Assistant to the Special Prosecutor.

MAY 1974.

APPENDIX A

In the United States District Court for the District of Columbia

Criminal No. 74–110

UNITED STATES OF AMERICA

v.

JOHN N. MITCHELL, ET AL.

(Filed: May 20, 1974, James F. Davey, Clerk)

OPINION AND ORDER

This matter comes before the Court on motion of President Richard M. Nixon to quash a subpoena *duces tecum* issued to him by the Watergate Special Prosecutor with leave of this Court.

On April 16, 1974, Special Prosecutor Leon Jaworski moved the Court for an order, pursuant to Rule 17(c),[1] Federal Rules of Criminal Procedure, directing the issuance of a subpoena for the produc-

[1] Rule 17. Subpoena: "(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

548-530—74——3

tion of specified materials prior to trial in the case of *United States* v. *John N. Mitchell, et al.*, CR 74–110, DDC.[2] The proposed subpoena, prepared by the Special Prosecutor and directed to the President "or any subordinate officer, official, or employee with custody or control of the documents or objects" described, listed in 46 paragraphs the specific meetings and telephone conversations for which tape recordings and related writings were sought. Relying on the legal memorandum and affidavit of the Special Prosecutor in support of the motion, the Court on April 18, 1974, ordered that the subpoena issue forthwith to the President commanding production before the Court.

Prior to the May 2, 1974, return date of the subpoena, the President filed a Special Appearance and Motion to Quash (eo nomine) which included a formal claim of privilege against disclosure of all subpoenaed items generally as "confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce."[3] Thereafter, within time limits fixed by the Court, the Special Prosecutor and five defendants filed papers opposing the President's motion to quash on various

[2] The motion asked that the subpoenaed materials be ordered produced before the Court with permission granted to Government attorneys to inspect them. Three of the seven defendants in United States v. Mitchell have filed motions joining in that of the Special Prosecutor with the stipulation that materials produced be made available to the defendants in full. A fourth defendant filed a response in support of the subpoena, but in opposition to the Special Prosecutor's motion insofar as it failed to assure defendants access to the materials upon production.

[3] The document noted, however, that "[p]ortions of twenty of the conversations described in the subpoena have been made public and no claim of privilege is advanced with regard to those Watergate-related portions of those conversations."

grounds.[4] The government's submission, containing a lengthy and detailed showing of its need for the subpoenaed items and their relevance, has been placed under seal as have the various reply briefs and motions for protective orders and to expunge that were subsequently filed.[5] The matter came on for oral argument *in camera* on May 13, 1974.

In entering a special appearance, the President contends that the Court lacks jurisdiction to enforce the instant subpoena on two grounds: First, courts are without authority to rule on the scope or applicability of executive privilege when asserted by the President, and Second, a dispute between the President and Special Prosecutor regarding the production of evidence is an intra-branch controversy wholly within the jurisdiction of the executive branch to resolve. The first contention, as the President admits, is without legal force in this Circuit.[6] See *Nixon* v. *Sirica*, —— U.S. App. D.C. ——, 487 F. 2d 700 (1973).

[4] Defendant Strachan also filed a motion for an order directing the issuance of a subpoena identical to that of the Special Prosecutor in the event that enforcement of the government subpoena is abandoned.

[5] Although initially accepted under the seal, the Court has released those portions of briefs relating to the jurisdictional issue of "intra-executive controversy" discussed in the text below.

The Court has granted a motion of the Special Prosecutor made pursuant to Rule 6(e), Federal Rules of Criminal Procedure, for leave to disclose grand jury proceedings as necessary in support of the subpoena with the proviso urged by defense counsel that, for the present, such disclosures not be made public.

[6] The President has asserted the point to preserve it, in his words, "should it be necessary for this case to reach a court in which *Nixon* v. *Sirica* is not a controlling precedent."

The second argument, whatever its merits in the setting of a disagreement between the President and a cabinet officer, for example, has no application to the present situation. The current Special Prosecutor is vested with the powers and authority conferred upon his predecessor pursuant to regulations which have the force of law.[7] Among other prerogatives, the Special Prosecutor has "full authority" to determine "whether or not to contest the assertion of 'Executive Privilege' or any other testimonial privilege." The Special Prosecutor's independence has been affirmed and reaffirmed by the President and his representatives,[8] and a unique guarantee of unfettered operation accorded him: "the jurisdiction of the Special Prosecutor will not be limited without the President's first consulting with such Members of Congress [the leaders of both Houses and the respective Committees on the Judiciary] and ascertaining that their consensus is in accord with his proposed action."[9] The Pres-

[7] *Nader* v. *Bork*, 366 F. Supp. 104 (DDC 1973). Former Special Prosecutor Archibald Cox received a delegation of powers and responsibilities from the Attorney General acting by authority of 28 U.S.C. §§ 509, 510 and 5 U.S.C. § 301. The terms of this delegation were promulgated by Department of Justice Order No. 517-73, 38 Fed. Reg. 14,688 (June 4, 1973) and reaffirmed as to Mr. Jaworski in Department of Justice Order No. 551-73, 38 Fed. Reg. 30,738 (November 7, 1973).

[8] *See, e.g., The President's News Conference of October 26, 1973*, 9 Weekly Compilation of Presidential Documents, p. 1289 (Oct. 29, 1973); Letter of Acting Attorney General Robert H. Bork to Leon Jaworski, Esq. dated November 21, 1973; and Hearings Before the Senate Committee on the Judiciary on the Special Prosecutor, 93rd Cong., 1st Sess., pt. 2, pp. 571-573.

[9] Department of Justice Order No. 554-73, 38 Fed. Reg. 32,805 (November 27, 1973).

ident not having so consulted, to the Court's knowledge, his attempt to abridge the Special Prosecutor's independence with the argument that he cannot seek evidence from the President by court process is a nullity and does not defeat the Court's jurisdiction.

The President advances three principal arguments on the merits supporting his motion to quash. Primary among these is his assertion that the subpoena, together with the Special Prosecutor's showing of relevancy and evidentiary value filed May 10, 1974, fails to comply with the requirements of Rule 17(c). It is conceded by all parties that Rule 17(c) cannot be employed as a vehicle for discovery, and that a showing of good cause is necessary. The landmark cases interpreting Rule 17(c), *Bowman Dairy Company* v. *United States*, 341 U.S. 214 (1951) and *United States* v. *Iozia*, 13 F.R.D. 335 (SDNY 1952), are cited and relied upon by both sides. Basically, good cause under Rule 17(c) requires a showing that (1) subpoenaed materials are evidentiary and relevant; (2) they are not otherwise procurable reasonably in advance of trial; (3) the party cannot properly prepare for trial without them, and failure to obtain them may delay the trial; and (4) the application is made in good faith, and does not constitute a "fishing expedition." See *United States* v. *Iozia, supra*, 13 F.R.D. at 338. It is the Court's position that the Special Prosecutor's May 10, 1974 memorandum correctly applies the Rule 17(c) standards, particularly in the more unusual situation of this kind where the subpoena, rather than being directed to the government by defendants, issues to what, as a practical matter, is a third party. It is the Court's conclusion as well, supported again by reference to the Special Prosecutor's memorandum

and appendix, that the requirements of Rule 17(c) are here met.[10]

With regard to the confidentiality privilege interposed by the President, the Court agrees that his claim is presumptively valid. The Special Prosecutor's submissions, however, in the Court's opinion, constitute a *prima facie* showing adequate to rebut the presumption in each instance, and a demonstration of need sufficiently compelling to warrant judicial examination in chambers incident to weighing claims of privlege where the prvilege has not been relinquished.[11] In citing relinquishment of privilege, the Court has reference to the portions of subpoenaed recordings which the President has caused to be re-

[10] The *Nixon* v. *Sirica* case, arising out of the grand jury investigation which produced the indictment herein, presented circumstances warranting the Court's *in camera* inspection of subpoenaed items. 487 F. 2d at 718, 719. The need for evidence presented here is, if anything, more compelling since the matter has developed into a criminal trial where the standard of proof is not simply probable cause but proof beyond a reasonable doubt, and where defendants confront a more direct threat to their reputations and liberty. The President contends that because the Special Prosecutor would not have commenced this case without evidence sufficient, in his opinion, to convict the defendants, the need for other evidence is insubstantial. Such an argument, however, ignores the fact not only that it is the Special Prosecutor alone, in this instance, who has the duty to determine the quantity and quality of evidence necessary to prosecute, but that the Prosecutor has an obligation to obtain and present *all* the relevant evidence. It has never been the law that once an indictment issues, evidence beyond that at hand is unnecessary and should not be sought.

[11] In this connection, it is significant that although the Special Prosecutor is forced in part to rest his showing on circumstantial evidence, having been denied access to the material solicited, in the approximately 20 instances where contents of subpoenaed tapes have been made public, the Prosecutor's assertions that

duced to transcript form and published. For such, the Court finds the privilege claimed non-existent since the conversations are, to that extent at least, no longer confidential. See *Nixon* v. *Sirica,* supra, 487 F. 2d at 718.

The President's third argument on the merits speaks to the defendants' contention that the subpoenaed materials are necessarily producible to them under the principles enunciated in *Brady* v. *Maryland,* 373 U.S. 83 (1963) and its progeny, the Jencks Act, 18 U.S.C. § 3500, and rules of discovery for criminal proceedings. The President maintains instead that defendants cannot require production under *Brady* of material in the possession of a non-investigatory government agency or items made unavailable because of their privileged character. The Court finds it unnecessary,

"Watergate" was discussed have been shown accurate without exception. Counsel for the President is unable to state that other subpoenaed items are or are not relevant to this case because he has not seen or heard them. (Transcript of Proceedings In Camera, May 13, 1974, pp. 61, 62.) Nevertheless, he cites the President's April 29, 1974 public characterization of edited transcripts produced from tape recordings including some of those here subpoenaed:

"They include all the relevant portions of all of the subpoenaed conversations that were recorded—that is, all portions that relate to the question of what I knew about Watergate or the cover-up, and what I did about it. They also include transcripts of other conversations which were not subpoenaed, but which have a significant bearing on the question of Presidential actions with regard to Watergate.

* * * * *

"As far as what the President personally knew and did with regard to Watergate and the cover-up is concerned, these materials—together with those already made available—will tell it all."

Be that as it may "what the President personally knew and did" is not dispositive of the issues in this case.

due to its disposition of the motion to quash, to reach this question. Under Rule 17(c), the Court "may permit" the materials produced "to be inspected by the parties or their attorneys." The Court intends to supply defense counsel with any and all exculpatory matter that may be found in the items produced, and to deliver any and all non-privileged matter to the Special Prosecutor. It is, of course, the Special Prosecutor's continuing obligation to furnish defendants with *Brady* material that comes into his possession. Defendants' requests for access to the whole of materials produced will be more appropriately considered in conjunction with their pretrial discovery motions.

In requiring compliance with the subpoena, that is, production before the Court, and in ruling on claims of privilege, the Court adopts in full the procedures and criteria established by the United States Court of Appeals for this Circuit in *Nixon* v. *Sirica, supra,* 487 F. 2d at 716–721 (parts IV, V, and VI of the majority opinion). Thus, adequate time will be allowed for preparation of an index and analysis detailing particular claims of privilege the President wishes to make. The originals of all subpoenaed items will accompany the index and analysis when transmitted to the Court. In addition, a separate tape recording, copies from the originals, containing only those portions of conversations since transcribed and made public should be prepared and delivered along with the subpoenaed materials.

To protect the rights of individuals, various of the proceedings and papers concerning this subpoena have been sealed. Such matters will remain under seal, and all persons having knowledge of them will remain subject to restrictions of confidentiality imposed upon them pending further order of the Court. The foregoing, of course, does not affect the transmittal of such materials to appellate courts under seal as a necessary part of the record in this matter. The Court sees no need to grant more extensive protective orders at this time or to expunge portions of the record. Matter sought to be expunged is relevant, for example, to a determination that the presumption of privilege is overcome.

Now, therefore, it is by the Court this 20th day of May, 1974,

ORDERED that the President's motion to quash be, and the same hereby is, denied; and it is

FURTHER ORDERED that on or before May 31, 1974, the President or any subordinate officer, official, or employee with custody or control of the documents or objects subpoenaed by the Special Prosecutor with leave of Court on April 18, 1974, shall deliver to the Court the originals of all subpoenaed items together with an index and analysis and copy tape recording as described in the foregoing opinion; and it is

FURTHER ORDERED that motions for protective orders and to expunge filed or raised orally in this matter, except to the extent already granted by the Court in proceedings heretofore, be, and the same hereby are, denied; and it is

FURTHER ORDERED that should the President initiate appellate review of the Court's order prior to 4:00 p.m., Friday, May 24, 1974, the Court's order shall be stayed pending the completion of such review.

JOHN J. SIRICA,
United States District Judge.

548-530—74——4

APPENDIX B

APPLICABLE PROVISIONS OF CONSTITUTION, STATUTES, RULES, AND REGULATIONS

1. The Constitution of the United States provides in pertinent part—

Article II, Section 1:

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

* * * * *

Article II, Section 2:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves, and Pardons for Offenses against the United States, except in Cases of Impeachment;

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein

otherwise provided for, and which shall be established by law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

* * * * *

Article II, Section 3:

* * * he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faihfully executed, and shall Commission all the Officers of the United States.

Article III, Section 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or subjects.

* * * * *

2. Title 5, United States Code, provides in pertinent part—

§ 301. DEPARTMENT REGULATIONS.

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withhold-

ing information from the public or limiting the availability of records to the public. Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 379.

Title 28, United States Code, provides in pertinent part—

§ 509. FUNCTIONS OF THE ATTORNEY GENERAL.

All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General except the functions—

(1) vested by subchapter II of chapter 5 of title 5 in hearing examiners employed by the Department of Justice;

(2) of the Federal Prison Industries, Inc.;

(3) of the Board of Directors and officers of the Federal Prison Industries, Inc.; and

(4) of the Board of Parole.

§ 510. DELEGATION OF AUTHORITY.

The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

§ 515. AUTHORITY FOR LEGAL PROCEEDINGS; COMMISSION, OATH, AND SALARY FOR SPECIAL ATTORNEYS.

(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether

or not he is a resident of the district in which the proceeding is brought.

* * * * *

§ 516. CONDUCT OF LITIGATION RESERVED TO DEPARTMENT OF JUSTICE.

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

§ 517. INTERESTS OF THE UNITED STATES IN PENDING SUITS.

The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

§ 518. CONDUCT AND ARGUMENT OF CASES.

(a) Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested.

(b) When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so.

§ 519. SUPERVISION OF LITIGATION.

Except as otherwise authorized by law, the Attorney General shall supervise all litigation

to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

3. Rule 17, Federal Rules of Criminal Procedure, provides in pertinent part—

SUBPOENA

* * * * *

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

* * * * *

4. Department of Justice Order No. 551-73 (Nov. 2, 1973) 38 Fed. Reg. 30,738 adding 28 C.F.R. §§ 0.37, and 0.38, and Appendix to Subpart G-1, provides

TITLE 28—JUDICIAL ADMINISTRATION

CHAPTER I—DEPARTMENT OF JUSTICE

Part O—Organization of the Department of Justice

Order No. 551-73

ESTABLISHING THE OFFICE OF WATERGATE SPECIAL PROSECUTION FORCE

By virtue of the authority vested in me by 28 U.S.C. 509, 510 and 5 U.S.C. 301, there is hereby established in the Department of Justice, the Office of Watergate Special Prosecution Force, to be headed by a Director. Accordingly, Part O of Chapter I of Title 28, Code of Federal Regulations, is amended as follows:

1. Section 0.1(a) which lists the organization units of the Department, is amended by adding "Office of Watergate Special Prosecution Force" immediately after "Office of Criminal Justice."

2. A new Subpart G-1 is added immediately after Subpart G, to read as follows:

"Subpart G-1—Office of Watergate Special Prosecution Force

§ 0.37 GENERAL FUNCTIONS.

The Office of Watergate Special Prosecution Force shall be under the direction of a Director who shall be the Special Prosecutor appointed by the Attorney General. The duties and re-

sponsibilities of the Special Prosecutor are set forth in the attached appendix which is incorporated and made a part hereof.

§ 0.38 SPECIFIC FUNCTIONS.

The Special Prosecutor is assigned and delegated the following specific functions with respect to matters specified in this Subpart:

(a) Pursuant to 28 U.S.C. 515(a), to conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings, which United States attorneys are authorized by law to conduct, and to designate attorneys to conduct such legal proceedings.

(b) To approve or disapprove the production or disclosure of information or files relating to matters within his cognizance in response to a subpoena, order, or other demand of a court or other authority. (See Part 16(B) of this chapter.)

(c) To apply for and to exercise the authority vested in the Attorney General under 18 U.S.C. 6005 relating to immunity of witnesses in Congressional proceedings.

The listing of these specific functions is for the purpose of illustrating the authority entrusted to the Special Prosecutor and is not intended to limit in any manner his authority to carry out his functions and responsibilities."

ROBERT H. BORK,
Acting Attorney General.

Date: November 2, 1973.

Appendix

DUTIES AND RESPONSIBILITIES OF THE SPECIAL PROSECUTOR

The Special Prosecutor

There is appointed by the Attorney General, within the Department of Justice, a Special Prosecutor to whom the Attorney General shall delegate the authorities and provide the staff and other resources described below.

The Special Prosecutor shall have full authority for investigating and prosecuting offenses against the United States arising out of the unauthorized entry into Democratic National Committee Headquarters at the Watergate, all offenses arising out of the 1972 Presidential Election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the President, members of the White House staff, or Presidential appointees, and any other matters which he consents to have assigned to him by the Attorney General.

In particular, the Special Prosecutor shall have full authority with respect to the above matters for:

—conducting proceedings before grand juries and any other investigations he deems necessary;
—reviewing all documentary evidence available from any source, as to which he shall have full access;
—determining whether or not to contest the assertion of "Executive Privilege" or any other testimonial privilege;

—determining whether or not application should be made to any Federal court for a grant of immunity to any witness, consistently with applicable statutory requirements, or for warrants, subpoenas, or other court orders;

—deciding whether or not to prosecute any individual, firm, corporation or group of individuals;

—initiating and conducting prosecutions, framing indictments, filing informations, and handling all aspects of any cases within his jurisdiction (whether initiated before or after his assumption of studies), including any appeals;

—coordinating and directing the activities of all Department of Justice personnel, including United States Attorneys;

—dealing with and appearing before Congressional committees having jurisdiction over any aspect of the above matters and determining what documents, information, and assistance shall be provided to such committees.

In exercising this authority, the Special Prosecutor will have the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice. The Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions. The Special Prosecutor will determine whether and to what extent he will inform or consult with the Attorney General about the conduct of his duties and responsibilities. In accordance with assurances given by the President to the Attorney General that the President will not

exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action.

Staff and Resource Support

1. *Selection of Staff.*—The Special Prosecutor shall have full authority to organize, select, and hire his own staff of attorneys, investigators, and supporting personnel, on a full or part-time basis, in such numbers and with such qualifications as he may reasonably require. He may request the Assistant Attorneys General and other officers of the Department of Justice to assign such personnel and to provide such other assistance as he may reasonably require. All personnel in the Department of Justice, including United States Attorneys, shall cooperate to the fullest extent possible with the Special Prosecutor.

2. *Budget.*—The Special Prosecutor will be provided with such funds and facilities to carry out his responsibilities as he may reasonably require. He shall have the right to submit budget requests for funds, positions, and other assistance, and such requests shall receive the highest priority.

3. *Designation and Responsibility.*—The personnel acting as the staff and assistants of the Special Prosecutor shall be known as the Watergate Special Prosecution Force and shall be responsible only to the Special Prosecutor.

Continued Responsibilities of Assistant Attorney General, Criminal Division.—Except for the specific investigative and prosecutorial duties assigned to the Special Prosecutor, the Assistant Attorney General in charge of the Criminal Division will continue to exercise all of the duties currently assigned to him.

Applicable Departmental Policies.—Except as otherwise herein specified or as mutually agreed between the Special Prosecutor and the Attorney General, the Watergate Special Prosecution Force will be subject to the administrative regulations and policies of the Department of Justice.

Public Reports.—The Special Prosecutor may from time to time make public such statements or reports as he deems appropriate and shall upon completion of his assignment submit a final report to the appropriate persons or entities of the Congress.

Duration of Assignment.—The Special Prosecutor will carry out these responsibilities, with the full support of the Department of Justice, until such time as, in his judgment, he has completed them or until a date mutually agreed upon between the Attorney General and himself.

Department of Justice Order No. 554–73 (Nov. 19, 1973) 38 Fed. Reg. 32,805, amending 28 C.F.R. Appendix to Subpart G–1, provides—

OFFICE OF THE ATTORNEY GENERAL,
WASHINGTON, D.C. 20530.

TITLE 28—JUDICIAL ADMINISTRATION

CHAPTER I—DEPARTMENT OF JUSTICE

Part O—Organization of the Department of Justice

SUBPART G–1—OFFICE OF WATERGATE SPECIAL PROSECUTION FORCE

Order No. 554–73

AMENDING THE REGULATIONS ESTABLISHING THE OFFICE OF WATERGATE SPECIAL PROSECUTION FORCE

By virtue of the authority vested in me by 28 U.S.C. 509, 510 and 5 U.S.C. 301, the last sentence of the fourth paragraph of the Appendix to Subpart G–1 is amended to read as follows: "In accordance with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, (1) the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and

Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action, and (2) the jurisdiction of the Special Prosecutor will not be limited without the President's first consulting with such Members of Congress and ascertaining that their consensus is in accord with his proposed action."

ROBERT H. BORK,
Acting Attorney General.

Date: November 19, 1973.

5. The letter from the Acting Attorney General to the Special Prosecutor on November 21, 1973, stating the intention of Department of Justice Order No. 554–73, is as follows:

OFFICE OF THE SOLICITOR GENERAL,
Washington, D.C. 20530, November 21, 1973.

LEON JAWORSKI, Esq.,
Special Prosecutor,
Watergate Special Prosecution Force,
1425 K Street, N.W.,
Washington, D.C. 20005

DEAR MR. JAWORSKI: You have informed me that the amendment to your charter of November 19, 1973 has been questioned by some members of the press. This letter is to confirm what I told you in our telephone conversation. The amendment of November 19, 1973 was intended to be, and is, a safeguard of your independence.

The President has given his assurance that he would not exercise his constitutional powers either to discharge the Special Prosecutor or to limit the independence of the Special Prosecutor without first consulting the Majority and Minority leaders and chairmen and ranking members of the Judiciary Committees of the Senate and the House, and ascertaining that their consensus is in accord with his proposed action.

When that assurance was worked into the charter, the draftsman inadvertently used a form of words that might have been construed as applying the President's assurance only to the subject of discharge. This was subsequently pointed out to me by an assistant and I had the amendment of November 19 drafted

in order to put beyond question that the assurance given applied to your independence under the charter and not merely to the subject of discharge.

There is, in my judgment, no possibility whatever that the topics of discharge or limitation of independence will ever be of more than hypothetical interest. I write this letter only to repeat what you already know: the recent amendment to your charter was to correct an ambiguous phrasing and thus to make clear that the assurances concerning congressional consultation and consensus apply to all aspects of your independence.

Sincerely,

ROBERT H. BORK,
Acting Attorney General.

APPENDIX C

CO 206
NEW 12/71

Subpoena to Produce Document or Object — *Cr. Form No. 21 (Rev. 10–51)*

United States District Court for the District of Columbia

No. 74–110

UNITED STATES OF AMERICA

v.

JOHN N. MITCHELL, ET AL.

To Richard M. Nixon, The White House, Washington, D.C., or any subordinate officer, official, or employee with custody or control of the documents or objects hereinafter described on the attached schedule.

You are hereby commanded to appear in the United States District Court for the District of Columbia at Constitution Ave. & John Marshall Place in the city of the District of Columbia on the day of 1974 at ten o'clock A.M. to testify in the case of *United States* v. *John N. Mitchell, et al.* and bring with you the documents or objects listed on the attached schedule.

This subpoena is issued upon application of the[1] United States.

APRIL 16, 1974.

LEON JAWORSKI,
Attorney for the United States,
1425 K St. N.W., Washington, D.C.
Address

JAMES F. DAVEY,
Clerk.

By ROBERT L. LINE,
Deputy Clerk.

RETURN

Received this subpoena at on and on at served it on the within named by delivering a copy to h and tendering to h the fee for one day's attendance and the mileage allowed by law.[2]

----------,
By ----------,

Dated:
----------, 19--
Service Fees
Travel -------- $
Services -------- --------
Total ------ $

FPI—LK—8-14-62—120M—998

[1] Insert "United States," or "defendant" as the case may be.

[2] Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof. 28 USC 1825.

SCHEDULE OF DOCUMENTS AND OBJECTS TO BE PRODUCED BY OR ON BEHALF OF RICHARD M. NIXON

All tapes and other electronic and/or mechanical recordings or reproductions, and any memoranda, papers, transcripts, and other writings, relating to:

1. (a) Meeting on June 20, 1972, between the President and Charles W. Colson from 2:20 to 3:30 p.m. in the President's Executive Office Building office ("EOB"); (b) telephone conversation on June 20, 1972, between the President and Mr. Colson from 8:04 to 8:21 p.m. (placed from the EOB); and (c) telephone conversation between the President and Mr. Colson from 11:33 p.m. on June 20, 1972, to 12:05 a.m. on June 21, 1972 (placed from residence portion of the White House).

2. Three meetings on June 23, 1972, between the President and H. R. Haldeman from 10:04 to 10:39 a.m., from 1:04 to 1:13 p.m., and from 2:20 to 2:45 p.m. According to information furnished by the White House, the first meeting occurred in the Oval Office, and the third, in the EOB, with Ronald Ziegler in both cases present for part of the time. According to Mr. Haldeman's logs, the second meeting occurred in the Oval Office.

3. Meeting on the morning of November 15, 1972, among or between Messrs. Haldeman, John Ehrlichman, and John W. Dean, III in the President's office at Camp David.

4. Meeting and telephone conversation on January 5, 1973, between the President and Mr. Colson from 12:02 to 1:02 p.m. in the EOB and from 7:38 to 7:58 p.m. (placed from Camp David) respectively.

548-530—74——6

5. Meeting or telephone conversation in or about late January 1973 between the President and Mr. Colson in which E. Howard Hunt, Jr. was discussed.

6. Meetings between the President and Mr. Colson in the Oval Office on February 13, 1973, from 9:48 to 10:52 a.m. and on February 14, 1973, from 10:13 to 10:49 a.m. respectively.

7. Meeting on or about February 20, 1973, between the President and Mr. Haldeman in which Jeb Stuart Magruder was discussed.

8. Meeting on February 27, 1973, between the President and Mr. Dean from 3:55 to 4:20 p.m. in the Oval Office.

9. Meeting on March 17, 1973, between the President and Mr. Dean from 1:25 to 2:10 p.m. in the Oval Office.

10. Meetings on March 20, 1973, between the President and Mr. Haldeman from 10:47 a.m. to 12:10 p.m. (with Mr. Ehrlichman present from 11:40 a.m. on) and from 6:00 to 7:10 p.m. According to Mr. Haldeman's logs, these meetings occurred in the Oval Office.

11. Telephone conversation on March 20, 1973, between the President and Mr. Dean from 7:29 to 7:43 p.m.

12. Meeting on March 21, 1973, between the President and Mr. Ehrlichman from 9:15 to 10:12 a.m. in the Oval Office.

13. Telephone conversation on March 21, 1973, between the President and Mr. Colson from 7:53 to 8:24 p.m.

14. Meeting on March 22, 1973, between the President and Mr. Haldeman from 9:11 to 10:35 a.m. According to Mr. Haldeman's logs, this meeting occurred in the EOB.

15. Meeting on March 27, 1973, between the President and Mr. Ehrlichman from 11:10 a.m. to 1:30 p.m., with Mr. Haldeman present from 11:35 a.m. on. Mr. Ziegler and Stephen B. Bull were also present for parts of the time. According to Mr. Haldeman's logs, this meeting occurred in the EOB.

16. Meeting on March 30, 1973, between the President and Mr. Ehrlichman from 12:02 to 12:18 p.m. Mr. Ziegler may also have been present.

17. Telephone conversation on April 12, 1973, between the President and Mr. Colson from 7:31 to 7:48 p.m. (placed from residence portion of the White House).

18. Meeting on April 14, 1973, between the President and Mr. Ehrlichman from 8:55 to 11:31 a.m. in the EOB, with Mr. Haldeman present from 9:00 to 11:30 a.m.

19. Meeting on April 14, 1973, between the President and Mr. Haldeman from 1:55 to 2:13 p.m. in the Oval Office.

20. Meetings on April 14, 1973, among or between the President and Messrs. Ehrlichman and Haldeman from 2:24 to 3:55 p.m. and from 5:15 to 6:45 p.m. in the Oval Office and the EOB respectively.

21. Telephone conversation on April 14, 1973, between the President and Mr. Haldeman from 11:02 to 11:16 p.m. (placed from residence portion of the White House).

22. Telephone conversation on April 14, 1973, between the President and Mr. Ehrlichman from 11:22 to 11:53 p.m. (placed from residence portion of the White House).

23. Meeting on April 15, 1973, between the President and Mr. Ehrlichman from 10:35 to 11:15 a.m. (time approximate) in the Oval Office.

24. Telephone conversation on April 15, 1973, between the President and Mr. Haldeman from 3:27 to 3:44 p.m. (placed from the EOB).

25. Telephone conversation on April 16, 1973, between the President and Mr. Haldeman from 12:08 to 12:23 a.m. (placed from residence portion of the White House).

26. Telephone conversations on April 16, 1973, between the President and Mr. Ehrlichman from 8:18 to 8:22 a.m. and from 9:27 to 9:49 p.m. (placed from and received in residence portion of the White House respectively).

27. Meetings on April 16, 1973, among or between the President and Messrs. Haldeman and Ehrlichman from 9:50 to 9:59 a.m. and from 10:50 to 11:04 a.m., both in the Oval Office.

28. Meeting on April 16, 1973, between the President and Mr. Haldeman from noon to 12:31 p.m. in the Oval Office.

29. Meeting on April 16, 1973, between the President and Mr. Ehrlichman from 3:27 to 4:02 p.m. in the EOB. Mr. Ziegler was present from 3:35 p.m. on.

30. Meeting on April 17, 1973, between the President and Mr. Haldeman from 9:47 to 9:59 a.m. in the Oval Office.

31. Three meetings on April 17, 1973, among or between the President and Messrs. Haldeman and Ehrlichman from 12:35 to 2:20 p.m. in the Oval Office (with Mr. Ziegler present for part of the time), from 3:50 to 4:35 p.m. in the Oval Office, and from 5:50 to 7:14 p.m. in the EOB (with then Secretary William P. Rogers present for part of the time).

32. Telephone conversation on April 18, 1973, between the President and Mr. Haldeman from 12:05 to 12:20 a.m. (placed from residence portion of the White House).

33. Meeting on April 18, 1973, between the President and Mr. Ehrlichman from 3:05 to 3:23 p.m. in the Oval Office.

34. Meeting on April 18, 1973, among or between the President and Messrs. Haldeman and Ehrlichman from 6:30 to 8:05 p.m. in Aspen Lodge, Camp David.

35. Meeting on April 19, 1973, among or between the President and Messrs. Haldeman and Ehrlichman from 9:31 to 10:12 a.m. in the Oval Office.

36. Metings on April 19, 1973, between the President and Mr. Ehrlichman from 1:03 to 1:30 p.m. and from 5:15 to 5:45 p.m. to the Oval Office and the EOB respectively.

37. Telephone conversation on April 19, 1973, between the President and Mr. Haldeman from 9:37 to 9:53 p.m. (placed from the EOB).

38. Telephone conversation on April 19, 1973, between the President and Mr. Ehrlichman from 10:54 to 11:04 p.m. (received in residence portion of the White House).

39. Meetings on April 20, 1973, between the President and Mr. Haldeman from 8:15 to 8:39 a.m. and from 11:07 to 11:23 a.m., both in the Oval Office.

40. Meeting on April 20, 1973, among or between the President and Messrs. Haldeman and Ehrlichman from 12:16 to 12:34 p.m. in the Oval Office.

41. Meeting on April 25, 1973, among or between the President and Messrs. Haldeman and Ehrlichman from 11:06 a.m. to 1:55 p.m. According to Mr. Haldeman's logs, this meeting occurred in the EOB.

42. Meeting on April 25, 1973, between the President and Mr. Haldeman from 4:40 to 5:35 p.m. According to Mr. Haldeman's logs, this meeting occurred in the EOB.

43. Telephone conversations on April 25, 1973, between the President and Mr. Haldeman from 6:57 to 7:14 p.m. and from 7:46 to 7:53 p.m.

44. Telephone conversations on April 25, 1973, between the President and Mr. Ehrlichman from 7:17 to 7:19 p.m. and from 7:25 to 7:39 p.m.

45. Meetings on April 26, 1973, between the President and Mr. Haldeman from 8:55 to 10:24 a.m. and from 3:59 to 9:03 p.m., the latter with Mr. Ehrlichman present from 5:57

to 7:14 p.m. Messrs. Bull and Ziegler were also present at the second meeting for parts of the time. According to Mr. Haldeman's logs, the first meeting occurred in the Oval Office, and the second, in the EOB.

46. Telephone conversations on June 4, 1973, between the President and Mr. Haldeman from 10:05 to 10:20 p.m. and from 10:21 to 10:22 p.m. (both placed from residence portion of the White House).

APPENDIX D

In the United States District Court for the District of Columbia

(Filed: April 18, 1974, James F. Davey, Clerk)

Crim. Case No. 74–110

UNITED STATES OF AMERICA

v.

JOHN N. MITCHELL, ET AL.

ORDER

Upon consideration of the Motion of the United States for an order, pursuant to Rule 17(c), Federal Rules of Criminal Procedure, permitting the issuance of a subpoena for the production of certain materials before the Court prior to the trial of the above-captioned action, and defendants Charles W. Colson and Robert C. Mardian having joined in said Motion, and the Court having considered the Affidavit and Memorandum submitted in support of said Motion, and the Court having determined that the Motion should be granted, it is hereby this 18th day of April, 1974,

ORDERED that the attached subpoena be issued and made returnable before the Court at 10:00 a.m. on the 2nd day of May, 1974; and it is

FURTHER ORDERED that the United States Marshal for the District of Columbia is directed to serve forthwith a certified copy of this Order and the attached

subpoena on Richard M. Nixon, The White House, Washington, D.C.; and it is

FURTHER ORDERED that delivery to James D. St. Clair, Special Counsel to the President, or any other person of suitable age and discretion at the White House or the Old Executive Office Building, Washington, D.C. on or before the 22nd day of April, 1974, shall be deemed good and sufficient service.

JOHN J. SIRICA,
United States District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1766

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, ET AL., RESPONDENTS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

STATEMENT OF THE CASE

In documents filed May 24, 1974, the Special Prosecutor has asked this Court to grant certiorari before judgment in the Court of Appeals to review the decision of the District Court for the District of Columbia on May 20, 1974, denying the President's motion to quash a subpoena duces tecum. The Special Prosecutor further suggests to the Court that his brief be filed on June 7, 1974, and that the President file his brief on June 14, 1974, and requests that argument be heard "as soon after the filing of briefs as is consistent with the Court's calendar." The President opposes the petition for certiorari before judgment and he further opposes the suggestion for an expedited schedule.

REASON FOR DENYING THE WRIT

At page 9 of his Petition, the Special Prosecutor asserts that

> the constitutional issues involved in this case are exceedingly important, both in their own right and in the context of the litigation in which they arise. The case involves basic constitutional issues arising out of the doctrine of the separation of powers and the powers of the Judiciary and the prerogatives of the Chief Executive.

Of course, we agree with that characterization. But it is precisely because of the importance of these issues that the President opposes any attempt to shortcut the usual judicial process. Prompt judicial action is important in this case but "prompt judicial action does not mean unjudicial haste." *New York Times Co.* v. *United States,* 403 U.S. 713, 749 (1971) (Burger, C. J., dissenting). When a case raises the most fundamental issues of the allocation of power among the three branches of the federal government, it is more important that it be decided wisely than that it be decided hurriedly.

This is both a "great case" and a "hard case." If the unfortunate result of which Justice Holmes warned in a famous passage, *Northern Securities Co.* v. *United States,* 193 U.S. 197, 400–401 (1904), is to be avoided, it is imperative that this Court consider the case under those conditions that are essential to the judicial process at its best. This means that the Court must be assisted to the greatest possible extent by the lower courts and by counsel and that the Court must

have the opportunity for careful reflection and deliberation that wise decision requires.

> The indispensable condition for the discharge of the Court's responsibility is adequate time and ease of mind for research, reflection, and consultation in reaching a judgment, for critical review by colleagues when a draft opinion is prepared, and for clarification and revision in light of all that has gone before. [*Report of the Study Group on the Caseload of the Supreme Court* 1 (1972).]

Those conditions are hardly likely to exist in the closing days of a busy term, when the Court is already under grueling pressure to complete its action on difficult cases argued months before.

Attempts in the past by the Court to make a hurried disposition of an important case arising in the dying days of a term have not been among the proudest chapters in the history of the Court. *New York Times Co.* v. *United States,* 403 U.S. 713 (1971), is but the most recent example. Without commenting on the result in that case, it is hardly likely that any member of the Court found the conditions under which decision was made optimum or that the multiplicity of opinions that issued from the Court represent the best of which the Court was capable. What Justice Harlan said there, at 753, is applicable here as well:

> Due regard for the extraordinarily important and difficult questions involved in these litigations should have led the Court to shun such a precipitate timetable.

An earlier example were the cases of the war brides, *Reid* v. *Covert,* 351 U.S. 487 (1956), and *Kinsella* v. *Kruger,* 351 U.S. 470 (1956), although the pace there was less frenzied than what the Special Prosecutor apparently contemplates for the present case. In those cases review was granted on March 12th, oral argument was heard on May 3rd, and the decisions were announced on the last day of the term, June 11th. Even so, only a bare majority of the Court was prepared to rush to judgment. Justice Frankfurter reserved his vote, because the time had not been sufficient for adequate study and reflection. 351 U.S. at 485. Chief Justice Warren and Justices Black and Douglas announced that they would dissent but said "we need more time than is available in these closing days of the Term in which to write our dissenting views." 351 U.S. at 486.

The hasty decision in those cases bore bitter fruit. When the Court reconvened in the fall, it granted, on November 5, 1956, a petition for rehearing, and when the cases were finally decided on June 10, 1957, 354 U.S. 1 (1957), the Court, by a vote of six to two, accepted the constitutional proposition that it had rejected the preceding spring. Justice Harlan explained his change of vote:

> The petitions for rehearing which were filed last summer afforded an opportunity for a greater degree of reflection upon the difficult issues involved in these cases than, at least for me, was possible in the short interval between the argument and decision of the cases in the closing days of last Term. As a result I became satisfied that this court-martial jurisdiction could in any event not be sustained upon the reasoning of our prior opinion. [354 U.S. at 65.]

If a further example be needed, *A. L. A. Schecter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935), will serve as well as any. In *Schechter* certiorari was granted on April 15th, argument heard May 2nd and 3rd, and the decision announced on May 27th. History has long since pronounced its verdict on that unfortunate decision.

A case as important as the present one deserves better handling from this Court than was given the cases of the sick chickens, the war brides, or the Pentagon Papers. It is unreasonable to expect more from the Court, however, if it is asked to act under the conditions suggested by the Special Prosecutor.

Hasty decision is inappropriate in this case not only because of the importance of the issues involved but also because of their difficulty and their novelty. The issues raised in the Petition for Certiorari have never before been decided in this Court. Indeed the only precedents anywhere, which bear more than a remote analogy to what must be decided here, are the inconclusive rulings of Chief Justice Marshall sitting at circuit in the trial of Aaron Burr, *United States* v. *Burr,* 25 F. Cas. 187 (No. 14, 694) (C.C.D. Va. 1807), the decisions of the Court of Appeals for the District of Columbia Circuit in *Nixon* v. *Sirica,* 487 F. 2d 700 (D.C. Cir. 1973), and *Senate Select Committee* v. *Nixon,* No. 74–1258 (D.C. Cir., May 23, 1974), and the decision of the District Court that the Special Prosecutor is asking this Court to review.

Moreover, there are other substantial constitutional issues presently pending before the court of appeals in this proceeding concerning the district court's denial of the President's motions to expunge and for a protective order as well as the application of *Brady* v. *Maryland*, 373 U.S. 83 (1963) to privileged material not in the possession of the prosecution. Those issues, under seal by order of that court, are issues of first impression equally critical and significant to the outcome of the present litigation. Thus, it is even more imperative that all the issues involved in this proceeding receive careful consideration, reflection and deliberation at the intermediate appellate level prior to ultimate review by this Court.

This is not to underestimate the importance to the nation, and to the parties, of a prompt resolution of the present controversy to say that the urgency here is considerably less than in the steel seizure case, involving as it did the seizure of a basic industry in a time of war. However, the urgency of what is at issue here, the trial of persons charged with crimes, cannot be equated with the magnitude and irreparable effect to the Nation that was involved in the steel seizure case. Even under the more exigent conditions surrounding the steel seizure case, Justice Burton, speaking for himself and Justice Frankfurter, voted against bypassing the court of appeals.

> The constitutional issue which is the subject of the appeal deserves for its solution all of the wisdom that our judicial process makes available. The need for soundness in the result outweighs the need for speed in reaching it. The

> Nation is entitled to the substantial value inherent in an intermediate consideration of the issue by the Court of Appeals. Little time will be lost and none will be wasted in seeking it. The time taken will be available also for constructive consideration by the parties of their own positions and responsibilities. [*Youngstown Sheet & Tube Co.* v. *Sawyer*, 345 U.S. 937 (1952).]

All that Justice Burton wrote in that case is true here. There have been suggestions in the press that an opinion from the Court of Appeals would not be of benefit here because that court has already spoken on these issues in *Nixon* v. *Sirica*, 487 F. 2d 700 (D. C. Cir. 1973). Nevertheless it can only be of value to this Court to have the advantage of a decision by the Court of Appeals applying the rules it announced in the earlier case to the very different facts of the present case. The decision by the Court of Appeals last Thursday in the *Senate Select Committee* case—of which the District Court did not have the benefit when it made the order that it is sought to have reviewed here—shows that *Nixon* v. *Sirica* did not deal the death blow to executive privilege that some had imagined. The doctrine remains alive and well—and even if the limitations put on it in the *Sirica* case should ultimately be accepted as the law, the application of the doctrine as limited, is a sensitive question that requires hard judicial thinking. That thinking should be done in the first instance by the Court of Appeals. When the appropriate time comes, we shall of course argue to this Court that it ought not to ac-

cept the standard set out in *Nixon* v. *Sirica*, but on that issue—as on the other issues that will remain should we be unpersuasive on that point—it will be illuminating to see how the court that devised the *Sirica* standard thinks it applies to the present set of facts.

It should also be noted that there has been no assertion by either the defendants or the Special Prosecutor that the operation of the judicial process within the normal time frame would adversely affect the orderly administration of justice or the rights of the defendants in this case.[1] Thus, the purported need advanced by the Special Prosecutor for a hasty determination of the issues by avoiding the normal channels of appellate review is clearly outweighed by the actual need for a thorough and carefully considered review of the substantial constitutional issues involved in this litigation. In addition, it is at least questionable whether it is in the best interests of all parties involved to rush to judgment in this case in the midst of an impeachment inquiry involving intrinsically related matters.

Finally, the ability of counsel to assist the Court in the resolution of the issues in this case in such a short time frame is compounded by the concurrency of an impeachment inquiry in the Committee on the Judiciary, United States House of Representatives, which requires a full time effort by the President's Special Counsel and his staff.

[1] In fact, on May 1, 1974, a motion with respect to *inter alia*, a continuance, was filed on behalf of defendant Ehrlichman. Defendant Haldeman moved the district court to adopt that request on the same date.

To allow the judicial process to run its orderly course will cause some delay, but though speedy justice in an important aim of the law it can never take precedence over just justice. "We all crave speedier judicial processes but when judges are pressured as in these cases the result is a parody of the judicial function." *New York Times Co.* v. *United States*, 403 U.S. 713, 752 (1971) (Burger, C. J., dissenting).

CONCLUSION

For all of the foregoing reasons the petition for certiorari before judgment ought to be denied.

Respectfully submitted,

CHARLES ALAN WRIGHT,
2500 Red River Street,
Austin, Texas 78705
JAMES D. ST. CLAIR,
MICHAEL A. STERLACCI,
JEROME J. MURPHY,
JEAN A. STAUDT,
Attorneys for the President,
The White House,
Washington, D.C. 20500.

U.S. GOVERNMENT PRINTING OFFICE: 1974

Supreme Court, U. S.
FILED
JUN 6 1974
MICHAEL RODAK, JR., CLERK

No. 73-1834

In the Supreme Court of the United States

OCTOBER TERM, 1973

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES,
PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENTS

CROSS-PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

JAMES D. ST. CLAIR,
MICHAEL A. STERLACCI,
JEROME J. MURPHY,
JEAN A. STAUDT,
JAMES R. PROCHNOW,
Attorneys for the President,
The White House,
Washington, D.C. 20500.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1834

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENTS

CROSS-PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

Richard Nixon, President of the United States, through his counsel, cross-petitions for a writ of certiorari before judgment in the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS

The district court's opinion and order of May 20, 1974, denying the motions to quash the subpoena and to expunge are not yet officially reported.[1]

JURISDICTION

The jurisdictional statement filed by the Special Prosecutor in his Petition for Writ of Certiorari is hereby incorporated by reference.

[1] The full text of the Court's opinion and order are set forth in the Petition for Writ of Certiorari before Judgement filed by the Special Prosecutor May 24, 1974. (Hereinafter cited as Petition for Writ) See appendix A, pp. 15–23.

QUESTIONS PRESENTED

In addition to those questions presented by the Special Prosecutor in his Petition for Writ of Certiorari the following question is presented for review:

Whether, under the Constitution, a grand jury has the authority to charge an incumbent President as an unindicted co-conspirator in a criminal proceeding.

CONSTITUTIONAL PROVISIONS

The additional provisions of the United States Constitution are relevant to the question presented.

ARTICLE I

Sec. 2, par. 5. The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Sec. 3, par. 6. The Senate shall have the sole Power to try all Impeachments. When sitting for that purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Sec. 3, par. 7. Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

ARTICLE II

Sec. 1, par. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four years, and, together with the Vice President, chosen for the same Term, be elected * * *.

Sec. 2, par. 1. The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

Sec. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed and shall Commission all the Officers of the United States.

Sec. 4. The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III

Sec. 2, par. 3. The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

STATEMENT OF THE CASE

The statement filed by the Special Prosecutor in his Petition adequately presents the factual development of this case.

REASONS FOR GRANTING WRIT

It is our belief that the issue presented for review by this Cross-Petition is already before the Court.[2] The Special Prosecutor has understandably not identified this issue with particular clarity because of its prejudicial nature, and in an exercise of caution to insure that this critical issue is properly presented for review, we are filing this Cross-Petition.[3]

It is essential that the Court grant this Cross-Petition in order that the respondent not be divested

[2] See Letter from Counsel to the Special Prosecutor to Clerk, Supreme Court of the United States, dated June 3, 1974. We are in agreement with the Special Prosecutor that because of the grand jury matters involved, it is imperative that the Joint Appendix or portions thereof be placed under seal.

[3] See e.g., *National Labor Relations Board* v. *International Van Lines*, 409 U.S. 48, 52 n.4 (1972) where respondent was precluded from seeking review of an adverse issue where no timely cross-petition for certiorari was filed. See also, *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 516 (1972).

of his right to appeal an adverse decision of a district court by at least one court of appellate jurisdiction. Moreover, this is an issue of first impression concerning a question of grave constitutional magnitude and import that should not be determined with finality by a single district court. If the decision of the district court on this issue is allowed to stand, we believe it seriously impinges upon the constitutional grant of authority vested in the United States House of Representatives by Article I. In addition, such a decision could be interpreted to mean that a President would be subject to similar action by any grand jury throughout the United States. The prejudicial nature and irreparable effect of such a grand jury finding cannot be seriously questioned. If the Court, however, deems it advisable for this issue to be severed and heard in the first instance in the United States Court of Appeals, due to the summary disposition of this issue by the district court, respondent has no objection. Moreover, in the course of this proceeding, if this Court finds it unnecessary to resolve this issue, for any reason, we request that the Court frame its order in such a manner as to preserve the appealability of this issue in a subsequent proceeding, if necessary.

CONCLUSION

For the reasons stated above, the cross-petition for certiorari should be granted, or in the alternative, the issue should be certified to the United States Court of Appeals.

Respectfully submitted,

JAMES D. ST. CLAIR,
MICHAEL A. STERLACCI,
JEROME J. MURPHY,
JEAN A. STAUDT,
JAMES R. PROCHNOW,
Attorneys for the President,
The White House,
Washington, D.C. 20500.

U.S. GOVERNMENT PRINTING OFFICE: 1974

INDEX

	Page
Opinion and orders below	1
Jurisdiction	2
Questions presented	3
Constitutional provisions, statutes, rule, and regulations involved	4
Statement	5
Summary of argument	16
Argument	24
Introduction: The issues before the Court present a live, concrete justiciable controversy	24
A. This case comes within the judicial power of the federal courts	25
B. The United States, represented by the Special Prosecutor, is a party distinct from the President	27
C. The Special Prosecutor has authority to seek, and the federal courts have power to grant, a production order addressed to the President even though the Special Prosecutor is a member of the Executive Branch	33
1. Whatever power the President may have to circumvent an adverse ruling by taking steps to abrogate the Special Prosecutor's independence cannot serve to render the controversy nonjusticiable	34
2. There is no lack of a true case or controversy because the opposing parties are both members of the Executive Branch	40
D. The speculative possibility that the President may disregard a valid court order does not deprive the Court of jurisdiction	44

550-718—74——1

Argument—Continued Page

I. The courts have both the power and the duty to determine the validity of a claim of executive privilege when it is asserted in a judicial proceeding as a ground for refusing to produce evidence 48
A. The courts have the power to resolve all issues in a controversy properly before them, even though this requires determining, authoritatively, the powers and responsibilities of the other branches 48
B. The judicial power to determine the limits of executive authority when necessary to resolve a justiciable controversy includes the power to resolve claims of executive privilege made with regard to evidence sought by the prosecutor for use in a pending criminal case 52
C. Courts have the power to order the production of evidence from the Executive when justice so requires 61
II. The President is not immune from judicial orders requiring the production of material evidence for a criminal trial 67
A. The power of the courts to issue subpoenas to the President, long recognized by the courts, flows from the fundamental principle that no man is above the law 69
B. There is no basis either in the Constitution or in the intent of the Framers for conferring absolute immunity on the President 76
C. The courts can issue process to the President where, as here, it does not interfere with his exercise of discretionary power but merely requires ministerial compliance with a legal duty 80
III. The conversations described in the subpoena relating to Watergate lie outside the executive privilege for confidential communications 84
A. Executive privilege based upon a need for candor in governmental deliberations does not apply where there is a *prima facie* showing that the discussions were in furtherance of a continuing criminal conspiracy 90

Argument—Continued Page

1. The grand jury's finding is valid and is sufficient to show *prima facie* that the President was a co-conspirator 97
B. The public interest in disclosure of relevant conversations for use at trial in this case is greater than the public interest served by secrecy 103
1. The balancing process followed by the district court accords with decisions of this Court 104
2. There is a compelling public interest in trying the conspiracy charged in *United States* v. *Mitchell, et al.*, upon all relevant and material evidence 107
3. Disclosure of the subpoenaed recordings will not significantly impair the interests protected by secrecy 114
4. The balance in this case overwhelmingly mandates in favor of disclosure 116
IV. Any privilege attaching to the subpoenaed conversations relating to Watergate has been waived as a result of pervasive disclosures made with the President's express consent 116
V. The district court properly determined that the subpoena *duces tecum* issued to the President satisfied the standards of Rule 17(c), because an adequate showing had been made that the subpoenaed items are relevant and evidentiary 123
A. Rule 17(c) permits the government to obtain relevant, evidentiary material sought in good faith for use at trial 125
B. There was ample support for the finding of the district court that the government's showing of relevancy and evidentiary value was adequate to satisfy Rule 17(c) 132
1. Relevance 132
2. Evidentiary nature 134
3. Need for the evidence prior to trial 138
Conclusion 139
Appendix 141

CITATIONS

Cases: Page

Accardi v. *Shaughnessy*, 347 U.S. 260 ..... 33, 36
Alderman v. *United States*, 394 U.S. 165 ..... 64, 85
Amar Chand Butail v. *Union of India*, [1965] 1 India S. Ct. 243 56
Anderson v. *United States*, —— U.S. —— (42 U.S.L.W. 4815, June 3, 1974) 136
Application of Johnson, 484 F. 2d 791 (7th Cir. 1973) .. 99–100
Baker v. *Carr*, 369 U.S. 186 ..... 40, 42, 46, 83
Ballinger v. *Frost*, 216 U.S. 240 68
Barr v. *Matteo*, 360 U.S. 564 95
Berger v. *United States*, 295 U.S. 78 28
Bivens v. *Six Unknown Federal Bureau of Narcotics Agents*, 456 F. 2d 1339 (2d Cir. 1972) 95
Black v. *Sheraton Corp.*, 371 F. Supp. 97 (D.D.C. 1974) 94
Blackmer v. *United States*, 284 U.S. 421 70
Blair v. *United States*, 250 U.S. 273 70
Board of Education v. *Allen*, 392 U.S. 236 33
Boeing Airplane Co. v. *Coggeshall*, 280 F. 2d 654 (D.C. Cir. 1960) 63
Bowman Dairy Co. v. *United States*, 341 U.S. 214 .. 62, 126–31
Brady v. *Maryland*, 383 U.S. 83 15
Branzburg v. *Hayes*, 408 U.S. 665 ..... 69, 71
Brown v. *United States*, 356 U.S. 148 121
Brown v. *Walker*, 161 U.S. 591 121
Bruce v. *Waldron*, [1963] Vict. L.R. 3 56
Calumet Broadcasting Corp. v. *FCC*, 160 F. 2d 285 (D.C. Cir. 1947) 137
Carl Zeiss Stiftung v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), aff'd on the opinion below, 384 F. 2d 979 (D.C. Cir. 1967), cert. denied, 389 U.S. 952 ..... 91, 94
Carr v. *Monroe Manufacturing Co.*, 431 F. 2d 384 (5th Cir. 1970), cert. denied, 400 U.S. 1000 ..... 55, 58–59, 103
Clark v. *United States*, 289 U.S. 1 ..... 95–97, 100–01, 108–09
Coleman v. *Miller*, 307 U.S. 433 33
Colegrove v. *Green*, 328 U.S. 549 82

Cases—Continued Page

Committee for Nuclear Responsibility, Inc. v. *Seaborg*, 463 F. 2d 788 (D.C. Cir. 1971) 55, 57–58, 88, 95, 108
Conway v. *Rimmer*, [1968] 1 All E.R. 874 56
Cooney v. *Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708 (E.D. Pa. 1968) 63
Cooper v. *Aaron*, 358 U.S. 1 69
Corbett v. *Social Security Comm'n*, [1962] N.Z.L.R. 878 .. 56
Costello v. *United States*, 350 U.S. 359 98
Covey Oil Co. v. *Continental Oil Co.*, 340 F. 2d 993 (10th Cir. 1965), cert. denied, 380 U.S. 964 124–25
DeFunis v. *Odegaard*, ——U.S.——(42 U.S.L.W. 4578, April 23, 1974) 39
Dennis v. *United States*, 384 U.S. 855 113
Doe v. *McMillan*, 412 U.S. 306 ..... 26, 52, 88, 90, 94, 95, 103
Dutton v. *Evans*, 400 U.S. 74 136
Ellis v. *United States*, 416 F. 2d 791 (D.C. Cir. 1969) .. 118
Environmental Protection Agency v. *Mink*, 410 U.S. 73 ..... 51, 61–62, 103
Ethyl Corp. v. *Environmental Protection Agency*, 478 F. 2d 47 (4th Cir. 1973) 55
Ewing v. *Mytinger & Casselberry*, 339 U.S. 594 98
Ex parte United States, 287 U.S. 241 98
Flast v. *Cohen*, 392 U.S. 83 ..... 40, 42
The Floyd Acceptances, 7 Wall. (74 U.S.) 666 80
Gagnon v. *Quebec Securities Comm'n.*, [1965] 50 D.L.R. 2d 329 (1964) 56
Garfield v. *United States ex rel. Goldsby*, 211 U.S. 249 .. 68
Garland v. *Torre*, 259 F. 2d 545 (2d Cir. 1958), cert. denied, 358 U.S. 910 63
Garner v. *Wolfinbarger*, 430 F. 2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974 92
Georgia v. *Stanton*, 6 Wall. (73 U.S.) 50 82
Glidden Co. v. *Zdanok*, 370 U.S. 530 ..... 37, 46
Gravel v. *United States*, 408 U.S. 606 ..... 26, 56, 93
Halpern v. *United States*, 258 F. 2d 36 (2d Cir. 1958) .. 55, 94
Hancock Bros., Inc. v. *Jones*, 293 F. Supp. 1229 (N.D. Cal. 1968) 63
Hodgson v. *Charles Martin Inspectors of Petroleum, Inc.*, 459 F. 2d 303 (5th Cir. 1969) 107
Humphrey's Executor v. *United States*, 295 U.S. 602 .. 37, 38
Hunt v. *Blackburn*, 128 U.S. 464 ..... 118, 120

Cases—Continued

	Page
In Re Associated Gas & Electric Co., 59 F. Supp. 743 (S.D.N.Y. 1944)	120–21
In Re Grand Jury Proceedings, 479 F. 2d 458 (5th Cir. 1973)	99
In Re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon, 360 F. Supp. 1 (D.D.C. 1973)	7, 9, 44, 47
In the Matter of Michael, 326 U.S. 224	123
International Paper Co. v. *Federal Power Commission*, 438 F. 2d 1349 (2d Cir. 1971), cert. denied, 404 U.S. 827	91
Jacobs v. *United States*, 404 U.S. 958	97
Jencks v. *United States*, 353 U.S. 657	64
Kaiser Aluminum & Chemical Corp. v. *United States*, 157 F. Supp. 939 (1958)	55–56, 87, 92
Kendall v. *United States ex rel. Stokes*, 12 Pet. (37 U.S.) 524	26, 37, 45, 49, 68
Kilbourn v. *Thompson*, 103 U.S. 168	26
La Abra Silver Mining Co. v. *United States*, 175 U.S. 423	46
Land v. *Dollar*, 190 F. 2d 623 (D.C. Cir. 1951), vacated as moot, 344 U.S. 806	49, 74–75
Lopez v. *United States*, 373 U.S. 427	111
Louisiana v. *McAdoo*, 234 U.S. 627	82
Machin v. *Zuckert*, 316 F. 2d 336 (D.C. Cir. 1963), cert. denied, 175 U.S. 896	63, 85
Marbury v. *Madison*, 1 Cranch (5 U.S.) 137	26, 45, 68, 82, 83
Mayberry v. *Pennsylvania*, 400 U.S. 455	60
McFadden v. *Avco Corp.*, 278 F. Supp. 57 (M.D. Ala. 1967)	63
McPherson v. *Blackmer*, 146 U.S. 1	46
Minnesota Chippewa Tribe v. *Carlucci*, 358 F. Supp. 973 (D.D.C. 1973)	74
Mississippi v. *Johnson*, 4 Wall. (71 U.S.) 475	80–82, 83, 84
Monroe v. *United States*, 234 F. 2d 49 (D.C. Cir. 1956), cert. denied, 352 U.S. 873	135, 137
Morgan v. *United States*, 304 U.S. 1	115
Morris v. *Atcheson, Topeka & Santa Fe Ry. Co.*, 21 F.R.D. 155 (W.D. Mo. 1957)	55, 63
Munzer v. *Swedish American Line*, 35 F. Supp. 493 (S.D.N.Y. 1940)	118, 120

Cases—Continued

	Page
Meyers v. *Nixon*, 339 F. Supp. 1388 (S.D.N.Y. 1972)	74
Myers v. *United States*, 272 U.S. 52	37, 38, 52
Myers v. *United States*, 377 F. 2d 412 (5th Cir. 1967), cert. denied, 390 U.S. 929	136
Nader v. *Bork*, 366 F. Supp. 104 (D.D.C. 1973)	8, 33, 36, 38
National Labor Relations Board v. *Capitol Fish Co.*, 294 F. 2d 868 (5th Cir. 1961)	55
National Treasury Employees Union v. *Nixon*, 492 F. 2d 587 (D.C. Cir. 1974), rev'g 349 F. Supp. 18 (D.D.C. 1972)	51, 74, 80, 82, 83
Nixon v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973)	passim
Offutt v. *United States*, 348 U.S. 11	60
Ohio v. *Wyandotte Chemicals Corp.*, 401 U.S. 493	82
O'Keefe v. *Boeing Co.*, 38 F.R.D. 329 (S.D.N.Y. 1965)	55
O'Rourke v. *Darbishire*, [1920] A.C. 581 (H.L.)	97
On Lee v. *United States*, 343 U.S. 747	137
O'Shea v. *Littleton*, —— U.S. ——(42 U.S.L.W. 4139, Jan. 15, 1974)	42, 95
Pan American World Airways, Inc. v. *Aetna Casualty & Surety Co.*, 368 F. Supp. 1098 (S.D.N.Y. 1973)	55, 63
Panama Canal Co. v. *Grace Lines, Inc.*, 356 U.S. 309	68
Parkhurst v. *Lowten*, 36 Eng. Rep. 589 (Ch. 1819)	117
Pereira v. *United States*, 347 U.S. 1	118
Pfizer, Inc. v. *Lord*, 456 F. 2d 545 (8th Cir. 1972)	97
Pilar v. *S.S. Hess Petrol*, 55 F.R.D. 159 (D. Md. 1972)	63
Powell v. *McCormack*, 395 U.S. 486	25, 26, 42, 46, 48, 53
Reese v. *Nixon*, 347 F. Supp. 314 (C.D. Cal. 1972)	80
Roberts v. *United States ex rel. Valentine*, 176 U.S. 219	68
Robinson v. *South Australia (No. 2)*, [1931] All E.R. 333 (P.C.)	56
Rosee v. *Board of Trade*, 35 F.R.D. 512 (N.D. Cal. 1964)	63, 94
Rosenfeld v. *Ungar*, 25 F.R.D. 340 (S.D. Iowa 1960)	120
Roviaro v. *United States*, 353 U.S. 53	25, 54, 64, 85, 107, 114, 117
Sampson v. *Murray*, —— U.S. —— (42 U.S.L.W. 4221, Feb. 19, 1974)	26
Schwimmer v. *United States*, 232 F. 2d 855 (8th Cir. 1956), cert. denied, 352 U.S. 833	125
Seaton v. *Texas Co.*, 256 F. 2d 718 (D.C. Cir. 1958)	84
Secretary of Agriculture v. *United States*, 350 U.S. 102	41

Cases—Continued

	Page
Senate Select Committee on Presidential Campaign Activities v. *Nixon*, —— F. 2d —— (No. 74–1258) (D.C. Cir. May 23, 1974)	26, 53, 112
Service v. *Dulles*, 354 U.S. 363	26, 33
Shotkin v. *Nelson*, 146 F. 2d 402 (10th Cir. 1944)	125
Snyder v. *United States*, 20 F.R.D. 7 (E.D.N.Y. 1956)	55
South Dakota v. *North Carolina*, 192 U.S. 286	46
Spalding v. *Vilas*, 161 U.S. 483	95
Sperandeo v. *Milk Drivers & Dairy Employees Local 537*, 334 F. 2d 381 (10th Cir. 1964)	55
Stubbs v. *United States*, 428 F. 2d 885, 888 (9th Cir. 1970), cert. denied, 400 U.S. 1009	134
Sue v. *Chicago Transit Authority*, 279 F. 2d 416 (7th Cir. 1960)	125
Super Tire Engineering Co. v. *McCorkle*, —— U.S. —— (42 U.S.L.W. 4507, April 16, 1974)	39
Tenney v. *Brandhove*, 341 U.S. 367	93–94
Timken Roller Bearing Co. v. *United States*, 38 F.R.D. 57 (N.D. Ohio 1964)	55
United States v. *Aldridge*, 484 F. 2d 655 (7th Cir. 1973)	92, 97
United States v. *Andreas*, —— F. Supp. ——(D. Minn. No. 4–73–Cr. 201) (Mar. 12, 1974)	33
United States v. *Article of Drug, etc.*, 43 F.R.D. 181 (D. Del. 1967)	55
United States v. *Bartlett*, 449 F. 2d 700 (8th Cir. 1971), cert. denied, 405 U.S. 932	92
United States v. *Bob*, 106 F. 2d 37 (2d Cir. 1939)	97
United States v. *Brewster*, 408 U.S. 501	26, 56, 93
United States v. *Burr*, 25 Fed. Cas. 30 (No. 14, 692d) (C.C.D. Va. 1807)	62, 70, 72, 83
United States v. *Burr*, 25 Fed. Cas. 187 (No. 14,694) (C.C.D. Va. 1807)	104–05, 107, 131
United States v. *Calandra*, —— U.S. —— (41 U.S. L.W. 4104, Jan. 8, 1974)	98
United States v. *California*, 332 U.S. 19	28
United States v. *Carter*, 15 F.R.D 367 (D.D.C. 1954)	128
United States v. *Connecticut National Bank*, Sup. Ct. No. 73–767	41
United States v. *Cote*, 456 F. 2d 142 (8th Cir. 1972)	118

Cases—Continued

	Page
United States v. *Cotton Valley Operators Comm.*, 9 F.R.D. 719 (W.D. La. 1949), aff'd by an equally divided Court, 339 U.S. 940	58
United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304	85
United States v. *Dionisio*, 410 U.S. 1	70
United States v. *Ehrlichman, et al.* (D.D.C. Crim. No. 74–116)	29, 33
United States v. *Friedman*, 445 F. 2d 1076 (9th Cir. 1971), cert. denied, 404 U.S. 958	37
United States v. *Gross*, 24 F.R.D. 138 (S.D.N.Y. 1959)	127, 129, 131
United States v. *Interstate Commerce Commission*, 78 F. Supp. 580 (D.D.C. 1948)	41
United States v. *Interstate Commerce Commission*, 337 U.S. 426	41
United States v. *Iozia*, 13 F.R.D. 335 (S.D.N.Y. 1952)	126–30
United States, v. *Isaacs and Kerner*, 493 F. 2d 1124 (7th Cir. 1974), Cert. denied, —— U.S. —— (June 17, 1974)	79, 99
United States v. *Jannuzio*, 22 F.R.D. 223 (D. Del. 1958)	129, 132
United States v. *Johnson*, 319 U.S. 503	56
United States v. *Kahn*, 471 F. 2d 191 (7th Cir. 1972), cert. denied, 411 U.S. 986	92–93
United States v. *King*, 482 F. 2d 768 (D.C. Cir. 1973)	98
United States v. *Kysar*, 459 F. 2d 422 (10th Cir. 1972)	98
United States v. *Lee*, 106 U.S. 196	72
United States v. *Lemonakis*, 485 F. 2d 941 (D.C. Cir. 1973), cert. denied, —— U.S. —— (42 U.S.L.W. 3541, March 26, 1974)	135, 137
United States v. *Madda*, 345 F. 2d 400 (7th Cir. 1965)	134
United States v. *Marine Bancorporation, Inc.*, Sup. Ct. No. 73–38	41
United States v. *McKeever*, 169 F. Supp. 426 (S.D. N.Y. 1958)	134, 137
United States v. *Mitchell, et al.* (D.D.C. Crim. No. 74–110)	passim
United States v. *Morgan*, 313 U.S. 409	115

Cases—Continued — Page

United States v. *Perkins*, 116 U.S. 483 — 37
United States v. *Procter & Gamble*, 25 F.R.D. 485 (D.N.J. 1960) — 94
United States v. *Reynolds*, 345 U.S. 1, rev'g 192 F. 2d 987 (3d Cir. 1951) — 10, 54, 57, 64, 85, 88, 103, 106
United States v. *Rosenstein*, 474 F. 2d 705 (2d Cir. 1973) — 92
United States v. *Schurz*, 102 U.S. 378 — 68
United States v. *SCRAP*, 412 U.S. 669 — 42
United States v. *Shewfelt*, 455 F. 2d 836 (9th Cir. 1972), cert. denied, 406 U.S. 944 — 92
United States v. *Shipp*, 203 U.S. 563 — 39
United States v. *Shipp*, 214 U.S. 386 — 39
United States v. *Solomon*, 26 F.R.D. 397 (S.D. Ill. 1960) — 129
United States v. *Sutton*, 426 F. 2d 1202 (D.C. Cir. 1969) — 134
United States v. *United States District Court*, 407 U.S. 297 — 26, 45, 49
United States v. *W. T. Grant Co.*, 345 U.S. 629 — 39
United States v. *White*, 401 U.S. 745 — 111
United States v. *Woodall*, 438 F. 2d 1317 (5th Cir. 1970) — 118
United States ex rel. Touhy v. *Ragen* 340 U.S. 462 — 63, 85
United States Servicemen's Fund v. *Eastland*, 488 F.2d 1252 (D.C. Cir. 1973) — 74
Vitarelli v. *Seaton*, 359 U.S. 535 — 33
Ward v. *Village of Monroeville*, 409 U.S. 57 — 60
Watkins v. *United States*, 354 U.S. 178 — 70
Westinghouse Electric Corp. v. *City of Burlington*, 351 F. 2d 762 (D.C. Cir. 1965) — 63, 117
Wiener v. *United States*, 357 U.S. 349 — 37, 38
Wilbur v. *United States ex rel. Kadrie*, 281 U.S. 206 — 68
Wisconsin v. *Pelican Insurance Co.*, 127 U.S. 265 — 82
Worcester v. *Georgia*, 6 Pet. (31 U.S.) 515 — 45, 75
Work v. *United States ex rel. Rives*, 267 U.S. 175 — 68
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 — 26, 45, 49–50, 52, 73–74

Constitution, Statutes, Rules, and Regulations:

Article I, Section 1 — 27, 93
Article I, Section 3 — 79
Article I, Section 6, clause 1 — 56
Article II, Section 2 — 27, 32

Constitution, Statutes, Rules, and Regulations—Con. — Page

Article II, Section 3 — 27
Article III — 42
5 U.S.C. 301 — 32
5 U.S.C. 552 — 61, 62
12 U.S.C. 1 — 41
12 U.S.C. 2 — 41
15 U.S.C. 18 — 41
18 U.S.C. 2519 — 51
18 U.S.C. 3006A — 51
18 U.S.C. 3231 — 26
18 U.S.C. 3331(a) — 51
18 U.S.C. 6003(a) — 51
18 U.S.C. 6005(a) — 51
28 U.S.C. 2 — 51
28 U.S.C. 44(c) — 51
28 U.S.C. 45 — 51
28 U.S.C. 47 — 51
28 U.S.C. 48 — 51
28 U.S.C. 134(b) — 51
28 U.S.C. 144 — 51
28 U.S.C. 331 — 51
28 U.S.C. 332 — 51
28 U.S.C. 333 — 51
28 U.S.C. 455 — 51, 60
28 U.S.C. 501 — 27
28 U.S.C. 503 — 27
28 U.S.C. 509 — 28, 32
28 U.S.C. 510 — 28, 32
28 U.S.C. 515–519 — 2, 28, 29, 39
28 U.S.C. 533 — 28
28 U.S.C. 1731–1745 — 51
28 U.S.C. 1826(b) — 51
28 U.S.C. 1863 — 51
28 U.S.C. 2102 — 51
28 U.S.C. 2254(b) — 51
28 U.S.C. 2284(4) — 51
28 U.S.C. 2403 — 51
Rule 37(b), Federal Rules of Civil Procedure — 64
Rule 16(g), Federal Rules of Criminal Procedure — 64
Rule 17(c), Federal Rules of Criminal Procedure — 26, 124–32

Constitution, Statutes, Rules, and Regulations—Con. Page

Department of Justice Order No. 517-73 (May 31, 1973), 38 Fed. Reg. 14,688, adding 28 C.F.R. § 0.37 and Appendix to Subpart G-1 6

Department of Justice Order No. 551-73 (Nov. 2, 1973), 38 Fed. Reg. 30,738, adding 28 C.F.R. §§ 0.37, 0.38, and Appendix to Subpart G-1 ..... 2, 10

Miscellaneous:

Berger, *Executive Privilege* v. *Congressional Inquiry*, 12 U.C.L.A. L. Rev. 1043 (1965) 53

Berger, *Executive Privilege: A Constitutional Myth* (1974) 55

Berger, *The President, Congress, and the Courts*, 83 Yale L.J. 1111 (1974) 70, 99

Cappelletti and Golden, *Crown Privilege and Executive Privilege: A British Response to an American Controversy*, 25 Stanford L. Rev. 836 (1973) 56

Congressional Quarterly, Inc., *Historic Documents, 1973* 8

32 *Congressional Quarterly* 1154 (May 11, 1974) 113

119 Cong. Rec. D1324 (daily ed. Nov. 21, 1973) 10

119 Cong. Rec. D1371 (daily ed. Dec. 3, 1973) 10

Corwin, *The President: Office and Powers* (1948) 77, 88

Elliot's Debates (2d Ed., 1836) 77

Executive Order No. 10340 (April 8, 1952) 49

Executive Order No. 11652 (March 8, 1972) 88

Fairman, *Reconstruction and Reunion 1864-88, 6 History of the Supreme Court of the United States* (1971) .. 80

Farrand, *Records of the Federal Convention of 1787* (1911) 77, 78

The Federalist No. 67 (B. F. Wright ed. 1961) 78

The Federalist No. 69 (B. F. Wright ed. 1961) 68

Future Crime or Tort Exemption to Communications Privileges, 77 Harv. L. Rev. 730 (1964) 93

Hand, *The Bill of Rights* (1958) 53-54

Hearings before the House Judiciary Subcommittee on Criminal Justice on H.J. Res. 784 and H.R. 10937, 93d Cong., 1st Sess. (1973) 9, 31

Hearings before the Senate Judiciary Committee on the Special Prosecutor, 93d Cong., 1st Sess. (1973) ... 9, 31, 44

Miscellaneous—Continued Page

Hearings before the Senate Judiciary Committee on the Nomination of Elliott L. Richardson to be Attorney General, 93d Cong., 1st Sess. (1973) 6

Hearings before the Senate Committee on the Judiciary on the Nomination of William Saxbe to be Attorney General, 93d Cong., 1st Sess. (1973) 31

Hearings before the Senate Select Committee on Presidential Campaign Activities, 93d Cong., 1st Sess. (1973) .. 6, 7, 121, 122

H.R. 11401, 93d Cong., 1st Sess. 10

H.R. 11555, 93d Cong., 1st Sess. 10

House of Representatives Calendar, 93d Cong., 2d Sess., for June 5, 1974 10

McCormick, *Evidence* (2d ed. 1972) 92, 112

8 Moore, *Federal Practice* 126-28

Morgan, *Foreword to American Law Institute Model Code of Evidence* 7 (1942) 90

New York Times, April 29, 1952, p. 1, col. 3 76

New York Times, May 2, 1952, p. 1, col. 5 76

2 Op. Att'y Gen. 482 (Dec. 28, 1831) 35

Proposed Federal Rules of Evidence, Rule 801(d)(1)(B) 137

Proposed Federal Rules of Evidence, Rule 901(b)(9) .. 134

Rawle, *A View of the Constitution of the United States of America* (2d ed. 1829) 99

S. 2611, 93d Cong., 1st Sess. 10

S. 2642, 93d Cong., 1st Sess. 10

Scigliano, *The Supreme Court and the Presidency* (1971) .. 75

Submission of the Recorded Presidential Conversations to the Committee on the Judiciary of the House of Representatives by President Richard Nixon, April 30, 1974 ..... 111, 119

Uniform Rules of Evidence, Rule 37 118

Van Deusen, *The Jacksonian Era, 1828-1848* (1959) .. 35

Warren, *The Supreme Court in United States History* (rev. ed. 1926) 75

9 *Weekly Compilation of Presidential Documents* 434 (May 7, 1973) 60

9 *Weekly Compilation of Presidential Documents* 697 (May 28, 1973) 118

Miscellaneous—Continued

Page

9 *Weekly Compilation of Presidential Documents* 1289 (Oct. 29, 1973) 10, 32
9 *Weekly Compilation of Presidential Documents* 1349 (Nov. 26, 1973) 60
10 *Weekly Compilation of Presidential Documents* 451–452 (May 6, 1974) 110, 120
8 Wigmore, *Evidence* (McNaughton rev. 1961) 58, 70, 85, 90, 92, 121, 122
Works of Jeremy Bentham (Bowring ed. 1843) 69–70
8 Wright & Miller, *Federal Practice and Procedure* (1970 ed.) 57, 63

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73–1766

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, ET AL., RESPONDENTS

No. 73–1834

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION AND ORDERS BELOW

The district court's order of April 18, 1974 (Pet. App. 47[1]) issuing the subpoena *duces tecum* in question is unreported. The district court's opinion and

[1] "Pet. App." refers to the Appendix to the Petition in No. 73–1766. "A." refers to the printed joint Appendix.

order of May 20, 1974, denying the motion to quash the subpoena, enforcing compliance therewith, and denying the motion to expunge (Pet. App. 15) is not yet officially reported.

JURISDICTION

The order of the district court (Pet. App. 23) was entered on May 20, 1974. On May 24, 1974, Richard M. Nixon, President of the United States, filed a timely notice of appeal from that order in the district court, and the certified record was docketed in the United States Court of Appeals for the District of Columbia Circuit that same day (D.C. Cir. No. 74–1534). Also on May 24, 1974, the President filed a petition for a writ of mandamus in the court below seeking review of the district court's order (D.C. Cir. No. 74–1532).[2]

On May 24, 1974, the Special Prosecutor filed a petition for a writ of certiorari before judgment on behalf of the United States (No. 73–1766),[3] and certiorari was granted on May 31, 1974. On June 6, 1974, President Nixon filed a cross-petition for a writ of certiorari before judgment (No. 73–1834), which was granted on June 15, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1), 1651, and 2101(e).

[2] In *Nixon* v. *Sirica*, 487 F. 2d 700, 707 n. 21 (D.C. Cir. 1973), the court of appeals stated that an order of this type directed to the President is appealable under 28 U.S.C. 1291. In any event, the court also asserted jurisdiction pursuant to the All Writs Act, 28 U.S.C. 1651. See 487 F. 2d at 706–707.

[3] Under 28 U.S.C. 510, 517, and 518, and Department of Justice Order No. 551–73, 28 C.F.R. § 0.37 *et seq.* (Appendix pp. 143–50, *infra*), the Special Prosecutor has authority, in lieu of the Solicitor General, to conduct litigation before this Court on behalf of the United States in cases within his jurisdiction.

In response to the Court's order of June 15, 1974, two jurisdictional questions are being discussed in our Supplemental Brief.

QUESTIONS PRESENTED

In No. 73–1766:

1. Whether a federal court must determine itself if executive privilege is properly invoked in a criminal proceeding or whether it is bound by the President's assertion of an absolute "executive privilege" to withhold demonstrably material evidence from the trial of charges of conspiracy to defraud the United States and obstruct justice by his own White House aides and party leaders, upon the ground that he deems production to be against the public interest.

2. Whether the President is subject to a judicial order directing compliance with a subpoena *duces tecum* calling for production of evidence, under his sole personal control, that is demonstrably material to a pending federal criminal prosecution.

3. Whether the President's claim of executive privilege based on the generalized interest in the confidentiality of government deliberations can block the prosecution's access to material evidence for the trial of criminal charges against the former officials who participated in those deliberations, particularly where there is a *prima facie* showing that the President is a co-conspirator and that the deliberations occurred in the course of and in furtherance of the conspiracy.

4. Whether any executive privilege that otherwise might have been applicable to discussions between the President and alleged co-conspirators concerning the Watergate matter has been waived by previous testi-

550-718—74——2

mony given pursuant to the President's approval and by the President's public release of edited transcripts of forty-three such conversations.

5. Whether the district court properly determined that the subpoena *duces tecum* issued to the President satisfied the standards of Rule 17(c) of the Federal Rules of Criminal Procedure because an adequate showing had been made that the subpoenaed items are relevant to issues to be tried and will be admissible in evidence.

In No. 73–1834:

6. Whether the district court acted within its discretion in declining to expunge the federal grand jury's naming of the President as an unindicted co-conspirator in offenses for which the grand jury returned an indictment.

The two questions the parties were requested to brief and argue by the Court's order of June 15, 1974, are discussed in our Supplemental Brief.

CONSTITUTIONAL PROVISIONS, STATUTES, RULE, AND REGULATIONS INVOLVED

The constitutional provisions, statutes, rule, and regulations involved, which are set forth in the Appendix, *infra*, pp. 141–53, are:

Constitution of the United States:
- Article II, Section 1
- Article II, Section 2
- Article II, Section 3
- Article III, Section 2

Statutes of the United States:
- 5 U.S.C. 301
- 28 U.S.C. 509, 510, 515–519

Rule:
- Rule 17(c), Federal Rules of Criminal Procedure

Regulations:
- Department of Justice Order No. 551–73 (November 2, 1973), 38 Fed. Reg. 30,738, adding 28 C.F.R. §§ 0.37, 0.38, and Appendix to Subpart G–1
- Department of Justice Order No. 554–73 (November 19, 1973), 38 Fed. Reg. 32,805, amending 28 C.F.R. Appendix to Subpart G–1

STATEMENT

This case presents for review the denial of a motion filed on behalf of respondent Richard M. Nixon, President of the United States, pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure, seeking to quash a subpoena *duces tecum* issued in a criminal case, directing the President to produce tape recordings and documents relating to sixty-four specifically described Presidential conversations. This subpoena (Pet. App. 39) issued on behalf of the United States at the request of the Special Prosecutor covers evidence which is demonstrably material to the trial of charges of conspiracy to defraud the United States and obstruct justice by former aides and associates of the President.

1. APPOINTMENT OF A SPECIAL PROSECUTOR

On May 25, 1973, Attorney General Elliot L. Richardson established the Office of the Watergate Special Prosecution Force, to be headed by Special Prosecu-

tor Archibald Cox, with "full authority for investigating and prosecuting offenses against the United States arising out of the unauthorized entry into Democratic National Committee headquarters at the Watergate."[4] The appointment of the Special Prosecutor, together with his specific duties and responsibilities, including full authority for determining whether or not to contest the assertion of "executive privilege," was settled in connection with the hearings of the Senate Judiciary Committee on the nomination of Mr. Richardson to be Attorney General.[5]

2. ENFORCEMENT OF THE 1973 GRAND JURY SUBPOENA DUCES TECUM

On July 16, 1973, Alexander Butterfield, formerly chief administrative officer at the White House, testified before the Senate Select Committee on Presidential Campaign Activities that at the President's direction the Secret Service as a matter of course had been recording automatically all conversations in the President's offices in the White House and Old Executive Office Building.[6] Because there had been sharply contradictory testimony regarding the relationship between several Presidential meetings and telephone conversations and an alleged conspiracy to conceal the identity of the persons responsible for the Watergate

[4] Department of Justice Order No. 517–73, 38 Fed. Reg. 14,688, adding 28 C.F.R. § 0.37 and Appendix to Subpart G–1.

[5] See *Hearings Before the Senate Judiciary Committee on the Nomination of Elliot L. Richardson to be Attorney General*, 93d Cong., 1st Sess. 144–46 (1973).

[6] *Hearings Before the Senate Select Committee on Presidential Campaign Activities*, 93d Cong., 1st Sess., Book 5, at 2074–81 (1973).

break-in, the Special Prosecutor issued a grand jury subpoena *duces tecum* to the President, who had assumed sole personal control over the recordings,[7] requiring him to produce the recordings of these meetings.

When the President refused to comply with the subpoena, the grand jury unanimously instructed the Special Prosecutor to apply for a court order requiring production. After a hearing, the court ordered the President to produce the subpoenaed items for *in camera* inspection, rejecting the President's contentions that he is immune from compulsory process and that he has absolute, unreviewable discretion to withhold evidence from the courts on the ground of executive privilege. *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon,* 360 F. Supp. 1 (D.D.C. 1973). The Court of Appeals for the District of Columbia Circuit upheld this order, with modifications, in an *en banc* decision denying the President's petition for a writ of mandamus. *Nixon* v. *Sirica,* 487 F. 2d 700 (1973). The court of appeals *sua sponte* then stayed its order to permit the President to seek review by this Court.

3. DISMISSAL OF THE SPECIAL PROSECUTOR

The President decided, however, not to seek review by this Court, and instead proposed a "compromise" to the Special Prosecutor which would have supplied edited transcripts of the subpoenaed recordings for use before the grand jury and at any subsequent trial.

[7] Letter from Richard M. Nixon to Senator Sam J. Ervin, Chairman of the Senate Select Committee on Presidential Campaign Activities, July 23, 1973, *id.*, Book 6, at 2479.

At the same time the President issued an order to Special Prosecutor Cox forbidding him ever again to resort to the judicial process to seek evidence from the President. The Special Prosecutor refused to accept this compromise or to accede to the order that would have barred him from exercising his discretion to seek evidence necessary for prosecutions within his jurisdiction. When the President then ordered Attorney General Richardson to dismiss the Special Prosecutor, the Attorney General resigned rather than obey, and Deputy Attorney General William Ruckelshaus was fired when he too refused to carry out the President's order.[8] On the night of October 20, 1973, Solicitor General Robert H. Bork, upon whom the responsibilities of Acting Attorney General devolved, elected to obey the President's instruction and peremptorily discharged Special Prosecutor Cox and abolished the Watergate Special Prosecution Force.[9]

On October 23, 1973, after considerable congressional and public reaction, counsel for the President announced to the district court that the President would comply with the district court's order as modified by the court of appeals.[10] Counsel for the President subsequently disclosed for the first time that two of the subpoenaed conversations were not recorded, and that eighteen and one-half minutes of the subpoenaed recording of the meeting between the President and H. R. Haldeman on June 20, 1972, had been obliterated.[11]

[8] See generally Congressional Quarterly, Inc., *Historic Documents 1973*, at 859–78.

[9] The United States District Court for the District of Columbia later ruled that the Special Prosecutor's firing was illegal because Acting Attorney General Bork had relied simply upon instructions from the President and had not purported to find any "extraordinary impropriety," as had been specified by the regulations establishing the Office of the Watergate Special Prosecutor as the sole ground for dismissal. *Nader* v. *Bork*, 366 F. Supp. 104 (1973), appeal pending.

4. APPOINTMENT OF A NEW SPECIAL PROSECUTOR

In response to the discharge of Special Prosecutor Cox, both the Senate Judiciary Committee and the House of Representatives Judiciary Subcommittee on Criminal Justice began hearings on legislation to establish a court-appointed Special Prosecutor independent of control by the President.[12] Both commit-

[10] Hearing on October 23, 1973, *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon*, D.D.C. Misc. No. 47–73.

[11] An Advisory Panel of experts, nominated jointly by the Special Prosecutor and counsel for the President, and appointed by the district court, has concluded that the only "completely plausible explanation" of the 18½ minute "buzz" section is a set of from five to nine erasures caused by manual operation of a recording machine. "Report on a Technical Investigation Conducted for the U.S. District Court for the District of Columbia by the Advisory Panel on White House Tapes," filed June 4, 1974. *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon*, D.D.C. Misc. No. 47–73.

[12] See *Hearings Before the Senate Judiciary Committee on the Special Prosecutor*, 93d Cong., 1st Sess. (1973); *Hearings Before the House Judiciary Subcommittee on Criminal Justice*, 93rd Cong., 1st Sess. (1973).

tees reported out such bills for action by the House and Senate.[13]

Neither House considered the legislation on the floor, however, because on October 26, 1973, the President announced that Acting Attorney General Bork would appoint a new Special Prosecutor. The President explained that he had no greater interest than seeing that the Special Prosecutor has "the independence that he needs" to prosecute the guilty and clear the innocent.[14]

On November 2, 1973, the Acting Attorney General re-established the Watergate Special Prosecution Force and appointed Leon Jaworski as Special Prosecutor, vesting in him the same powers and authority possessed by his predecessor, including "full authority" to "contest the assertion of 'Executive Privilege' or any other testimonial privilege" (Appendix pp. 146–51, *infra*).[15] The only change in the regulations relevant to this Court's consideration was the addition of a provision, in "accordance with assurances given by the President to the Attorney General," that the

[13] The Senate Committee on the Judiciary reported out S. 2611 (S. Rep. 93–595) and S. 2642 (S. Rep. 93–596). See 119 Cong. Rec. D 1324 (daily ed. Nov. 21, 1973). The House Committee on the Judiciary reported out H.R. 11401 (H. Rep. 93–660), which was rewritten as H.R. 11555 by the House Rules Committee. See 119 Cong. Rec. D 1371 (daily ed. Dec. 3, 1973). All three bills remain on the calendars of each House, subject to being called up on the floor without further hearings or committee action. See House Calendar, 93d Cong., 2d Sess., for June 5, 1974, at 138, 139 (Senate bills), 92 (House bill).

[14] 9 Weekly Compilation of Presidential Documents 1289 (October 29, 1973).

[15] Department of Justice Order No. 551–73, 38 Fed. Reg. 30,738.

President would not limit the jurisdiction of the Special Prosecutor or effect his dismissal without first consulting with the Majority and Minority Leaders of both Houses of Congress and their respective Committees on the Judiciary (Appendix pp. 151–52), *infra*).[16] Thereafter both Houses tabled the legislation for court appointment of an independent Special Prosecutor, but the bills remain on their respective calendars.

5. THE INDICTMENT IN THIS CASE AND THE NAMING OF THE PRESIDENT AS A CO-CONSPIRATOR

On March 1, 1974, a grand jury of the United States District Court for the District of Columbia returned an indictment (A. 5A) charging respondents John N. Mitchell, H. R. Haldeman, John D. Ehrlichman, Charles W. Colson, Robert C. Mardian, Kenneth W. Parkinson and Gordon Strachan with various offenses relating to the Watergate matter, including a conspiracy to defraud the United States and to obstruct justice. *United States* v. *Mitchell, et al.*, D.D.C. Crim. No. 74–110. At some or all of the times in question, respondent Mitchell, a former Attorney General of the United States, was Chairman of the Committee for the Re-Election of the President; respondent Haldeman was Assistant to the President and his chief of staff; respondent Ehrlichman was Assistant to the President for Domestic Affairs; respondent Colson was Special Counsel to the President; re-

[16] See also letter from the Acting Attorney General to the Special Prosecutor explaining this amendment (Appendix pp. 152–53, *infra*).

spondent Mardian, a former Assistant Attorney General, was an official of the President's re-election campaign; respondent Parkinson was an attorney for the re-election committee; and respondent Strachan was Staff Assistant to the President.

In the course of its consideration of the indictment, the grand jury, by a vote of 19–0, determined that there is probable cause to believe that respondent Richard M. Nixon (among others) was a member of the conspiracy to defraud the United States and to obstruct justice as charged in the indictment, and the grand jury authorized the Special Prosecutor to identify President Nixon (among others) as an unindicted co-conspirator in connection with subsequent legal proceedings.

6. ISSUANCE OF THE TRIAL SUBPOENA TO THE PRESIDENT

In order to obtain additional evidence which the Special Prosecutor has reason to believe is in the custody of the President and which would be important to the government's proof at the trial in *United States* v. *Mitchell, et al.*, the Special Prosecutor, on behalf of the United States, moved on April 16, 1974, for the issuance of the subpoena *duces tecum* in question (Pet. App. 39). On April 18, 1974, the district court ordered the subpoena to issue, returnable on May 2, 1974 (Pet. App. 47). The subpoena called for production of the evidence in advance of the September 9, 1974, trial date in order to allow time for any litigation over the subpoena and for transcription and authentication of any tape recordings produced.

On April 30, 1974, the President released to the public and submitted to the House Judiciary Committee conducting an impeachment inquiry 1,216 pages of edited transcripts of forty-three conversations dealing with Watergate. Portions of twenty subpoenaed conversations were included. On May 1, 1974, President Nixon, through his White House counsel, filed in the district court a "special appearance," a "formal claim of privilege," and a motion to quash the subpoena. (A. 47A) At the suggestion of counsel for the President and the Special Prosecutor and with the approval of counsel for the defendants, subsequent proceedings were held *in camera* because of the sensitive nature of the grand jury's finding with respect to the President, which was submitted to the district court by the Special Prosecutor as a ground for denying the motion to quash. Defendants Colson, Mardian, and Strachan formally joined in the Special Prosecutor's motion for issuance of the subpoena, and all seven defendants (respondents herein) argued in opposition to the motion to quash at the hearing in the district court. At that hearing, counsel for the President also moved to expunge the grand jury's finding and to enjoin all persons, except for the President and his counsel, from ever disclosing the grand jury's action.

7. THE DECISION BELOW

In its opinion and order of May 20, 1974 (Pet. App. 15), the district court denied the motion to quash and the motion to expunge and for protective orders.

It further ordered "the President or any subordinate officer, official or employee with custody or control of the documents or objects subpoenaed" to deliver to the court the originals of all subpoenaed items as well as an index and analysis of those items, together with tape copies of those portions of the subpoenaed recordings for which transcripts had been released to the public by the President on April 30, 1974. The district court stayed its order pending prompt application for appellate review and further provided that matters filed under seal remain under seal when transmitted as part of the record (Pet. App. 22–23).[17]

In requiring compliance with the subpoena *duces tecum,* the district court rejected the contention by counsel for the President that it had no jurisdiction because the proceeding allegedly involved solely an "intra-executive" dispute (Pet. App. 18). The court ruled that this argument lacked substance in light of jurisdictional responsibilities and independence with which the Special Prosecutor had been vested by regulations that have the force and effect of law and that had received the explicit concurrence of the President. The court noted the "unique guarantee of unfettered operation" given to the Special Prosecutor and emphasized that under these regulations the Special Prosecutor's jurisdiction, which includes express authority to contest claims of executive privilege, cannot be limited without the President's first consulting

[17] By order entered on June 7, 1974, the district court rescinded its orders sealing portions of the record. On June 15, 1974, this Court denied a motion to unseal the record except as it related to an extract concerning the grand jury's finding with respect to the President.

with the leaders of both Houses of Congress and the respective Committees on the Judiciary and securing their consensus (Pet. App. 18–19). In these circumstances, the court found that there exists sufficient independence to provide the court with a concrete legal controversy between adverse parties and not simply an intra-agency dispute over policy. Moreover, the court later noted that as a recipient of a subpoena in this criminal case, the President "as a practical matter, is a third party" (Pet. App. 19).

On the merits, and relying on the *en banc* decision in *Nixon* v. *Sirica, supra,* the district court held that in the circumstances of this case, the courts, and not the President, are the final arbiter of the applicability of a claim of executive privilege for the subpoenaed items (Pet. App. 17). Here, the court ruled, the presumptive privilege for documents and materials reflecting executive deliberations was overcome by the Special Prosecutor's *prima facie* showing that the items are relevant and important to the issues to be tried in the Watergate cover-up case and that they will be admissible in evidence (Pet. App. 20–21).[18]

Finally, the district court held that the Special Prosecutor, in his memorandum and appendix submitted to the court, satisfied the requirements of Rule 17(c) that the subpoenaed items be relevant and evidentiary (Pet. App. 19–20).

[18] As to claims by defendants that they are entitled to the subpoenaed items under Rule 17(c), the court withheld ruling, stating that defendants' requests for access will be more appropriately considered in conjunction with their pre-trial discovery motions (Pet. App. 21–22). Accordingly, the court refused to decide whether *Brady* v. *Maryland,* 373 U.S. 83, applies to "privileged" evidence not in the possession of the prosecutor.

The President has sought review of this decision in the court of appeals, and the case is now before this court on writs of certiorari before judgment granted on May 31, 1974, and June 15, 1974, on the petition of the United States and the cross-petition of the President, respectively.

SUMMARY OF ARGUMENT

The narrow issue presented to this Court is whether the President, in a pending prosecution against his former aides and associates being conducted in the name of the United States by a Special Prosecutor not subject to Presidential directions, may withhold material evidence from the court merely on his assertion that the evidence involves confidential governmental deliberations. The Court clearly has jurisdiction to decide this issue. The pending criminal prosecution in which the subpoena *duces tecum* was issued constitutes a "case or controversy," and the federal courts naturally have the duty and, therefore, the power to determine what evidence is admissible in that prosecution and to require that that evidence be produced. This is only a specific application of the general but fundamental principle of our constitutional system of government that the courts, as the "neutral" branch of government, have been allocated the responsibility to resolve all issues in a controversy properly before them, even though this requires them to determine authoritatively the powers and responsibilities of the other branches.

Any notion that this controversy, arising as it does from the issuance of a subpoena *duces tecum* to the

President at the request of the Special Prosecutor, is not justiciable is wholly illusory. In the context of the most concrete and vital kind of case—the federal criminal prosecution of former White House officials—the Special Prosecutor, as the attorney for the United States, has resorted to a traditional mechanism to procure evidence for the government's case at trial. In objecting to the enforcement of the subpoena, the President has raised a classic question of law—a claim of privilege—and the United States, through its counsel and in its sovereign capacity, is opposing that claim. Thus, viewed in practical terms, it would be hard to imagine a controversy more appropriate for judicial resolution.

The fact that this concrete controversy is presented in the context of a dispute between the President and the Special Prosecutor does not deprive this Court of jurisdiction. Congress has vested in the Attorney General, as the head of the Department of Justice, the exclusive authority to conduct the government's civil and criminal litigation, including the exclusive authority for securing evidence. The Attorney General, with the explicit concurrence of the President, has vested that authority with respect to Watergate matters in the Special Prosecutor. These regulations have the force and effect of law and establish the functional independence of the Special Prosecutor. Accordingly, the Special Prosecutor, representing the sovereign authority of the United States, and the President appear before the Court as adverse parties in the truest sense. The President himself has ceded any

power that he might have had to control the course of the pending prosecution, and it would stand the Constitution on its head to say that this arrangement, if respected and given effect by the courts, violates the "separation of powers."

I

Throughout our constitutional history the courts, in cases or controversies before them, consistently have exercised final authority to determine whether even the highest executive officials are acting in accordance with the Constitution. In fulfilling this basic constitutional function, they have issued appropriate decrees to implement those judicial decisions. The courts have not abjured this responsibility even when the most pressing needs of the Nation were at issue.

In applying this fundamental principle, the courts have determined for themselves not only what evidence is admissible in a pending case, but also what evidence must be produced, including whether particular materials are appropriately subject to a claim of executive privilege. Indeed, this Court has squarely rejected the claim that the Executive has absolute, unreviewable discretion to withhold documents from the courts.

The unbroken line of precedent establishing that the courts have the final authority for determining the applicability and scope of claims of executive privilege is supported by compelling arguments of policy. The Executive's legitimate interests in secrecy are more than adequately protected by the qualified privilege defined and applied by the courts. But as

this Court has recognized, an absolute privilege which permitted the Executive to make a binding determination would lead to intolerable abuse. This case highlights the inherent conflict of interest that is presented when the Executive is called upon to produce evidence in a case which calls into question the Executive's own action. The President cannot be a proper judge of whether the greater public interest lies in disclosing evidence subpoenaed for trial, when that evidence may have a material bearing on whether he is impeached and will bear heavily on the guilt or innocence of close aides and trusted advisors.

In the framework of this case, where the privilege holder is effectively a third party, the interests of justice as well as the interests of the parties to the pending prosecution require that the courts enter a decree requiring that relevant and unprivileged evidence be produced. The "produce or dismiss" option that is sometimes allowed to the Executive when a claim of executive privilege is overruled merely reflects a remedial accommodation of the requirements of substantive justice and thus has never been available to the Executive where the option could not satisfy these requirements. This is particularly true where the option would make a travesty out of the independent institution of the Special Prosecutor by allowing the President to accomplish indirectly what he cannot do directly: secure the abandonment of the Watergate prosecution.

550-718—74——3

II

There is nothing in the status of the President that deprives the courts of their constitutional power to resolve this dispute. The power to issue and enforce a subpoena *duces tecum* against the President was first recognized by Chief Justice Marshall in the *Burr* case in 1807, in accordance with two fundamental principles of our constitutional system: First, the President, like all executive officials as well as the humblest private citizens, is subject to the rule of law. Indeed, this follows inexorably from his constitutional duty to "take Care that the Laws be faithfully executed." Second, in the full and impartial administration of justice, the public has a right to every man's evidence. The persistent refusal of the courts to afford the President an absolute immunity from judicial process is fully supported by the deliberate decision of the Framers to deny him such a privilege.

Although it would be improper for the courts to control the exercise of the President's constitutional discretion, there can be no doubt that the President is subject to a judicial order requiring compliance with a clearly defined legal duty. The crucial jurisdictional factor is not the President's office, or the physical power to secure compliance with judicial orders, but the Court's ability to resolve authoritatively, within the context of a justiciable controversy, the conflicting claims of legal rights and obligations. The Court is called upon here to adjudicate the obligation of the President, as a citizen of the United States, to cooperate with a criminal prosecution by

performing the solely ministerial task of producing specified, unprivileged evidence that he has taken within his sole personal custody.

III

The qualified executive privilege for confidential intra-governmental deliberations, designed to promote the candid interchange between officials and their aides, exists only to protect the legitimate functioning of government. Thus, the privilege must give way where, as here, it has been abused. There has been a *prima facie* showing that each of the participants in the subpoenaed conversations, including the President, was a member of the conspiracy to defraud the United States and to obstruct justice charged in the indictment in the present case, and a further showing that each of the conversations occurred in the course of and in furtherance of the conspiracy. The public purpose underlying the executive privilege for governmental deliberations precludes its application to shield alleged criminality.

But even if a presumptive privilege were to be recognized in this case, the privilege cannot be sustained in the face of the compelling public interest in disclosure. The responsibility of the courts in passing on a claim of executive privilege is, in the first instance, to determine whether the party demanding the evidence has made a *prima facie* showing of a sufficient need to offset the presumptive validity of the Executive's claim. The cases have held that the balance should be struck in favor of disclosure only if the showing of need is strong and clear, leaving the courts

with a firm conviction that the public interest requires disclosure.

It is difficult to imagine any case where the balance could be clearer than it is on the special facts of this proceeding. The recordings sought are specifically identified, and the relevance of each conversation to the needs of trial has been established at length. The conversations are demonstrably important to defining the extent of the conspiracy in terms of time, membership and objectives. On the other hand, since the President has authorized each participant to discuss what he and the others have said, and since he repeatedly has summarized his views of the conversations, while releasing partial transcripts of a number of them, the public interest in continued confidentiality is vastly diminished.

The district court's ruling is exceedingly narrow and, thus, almost no incremental damage will be done to the valid interests in assuring future Presidential aides that legitimate advice on matters of policy will be kept secret. The unusual circumstances of this case—where high government officials are under indictment for conspiracy to defraud the United States and obstruct justice—at once make it imperative that the trial be conducted on the basis of all relevant evidence and at the same time make it highly unlikely that there will soon be a similar occasion to intrude on the confidentiality of the Executive Branch.

IV

Even if the subpoenaed conversations might once have been covered by a privilege, the privilege has been waived by the President's decision to authorize voluminous testimony and other statements concerning Watergate-related discussion and his recent release of 1,216 pages of transcript from forty-three Presidential conversations dealing with Watergate. A privilege holder may not make extensive disclosures concerning a subject and then selectively withhold portions that are essential to a complete and impartial record. Here, the President repeatedly has referred to the conversations in support of his own position and even allowed defendant Haldeman access to the recordings after he left public office to aid him in preparing his public testimony. In the unique circumstances of this case, where there is no longer any substantial confidentiality on the subject of Watergate because the President has made far-reaching, but expurgated disclosures, the court may use its process to acquire all relevant evidence to lay before the jury.

V

The district court, correctly applying the standards established by this Court, found that the government's showing satisfied the requirements of Rule 17(c) of the Federal Rules of Criminal Procedure that items subpoenaed for use at trial be relevant and evidentiary. The enforcement of a trial subpoena *duces tecum* is a question for the trial court and is committed to the court's sound discretion. Absent a showing that the finding by the court is arbitrary and had no support in the record, the finding must not be disturbed by an appellete court. Here, the Special Prosecutor's analysis of each of the sixty-four conversations, sub-

mitted to the district court, amply supports that court's finding.

ARGUMENT

INTRODUCTION: THE ISSUES BEFORE THE COURT PRESENT A LIVE, CONCRETE JUSTICIABLE CONTROVERSY

In the district court, counsel for the President, in a sealed reply to the government's papers opposing the motion to quash, raised for the first time the contention that the court lacked "jurisdiction to consider the Special Prosecutor's request of April 16, 1974, relating to the disclosure of certain presidential documents." Counsel was referring to the trial subpoena applied for by the Special Prosecutor on behalf of the United States (Pet. App. 39) and issued by the district court on April 18, 1974 (Pet. App. 47). It was that subpoena that the President moved to quash. The basis for the President's contention that the court lacked jurisdiction to "consider" that "request" for evidence was the assertion that the subpoena involved merely a "dispute between two entities within the Executive Branch."

The district court rejected this contention, ruling that under the circumstances established by applicable statutes and regulations, the President's "attempt to abridge the Special Prosecutor's independence with the argument that he cannot seek evidence from the President by court process is a nullity and does not defeat the Court's jurisdiction" (Pet. App. 19). Before addressing the issues before this Court on the merits, we pause to express the reasons why this litigation

between the United States, represented by the Special Prosecutor, and the President presents a live, concrete, justiciable controversy.

A. THIS CASE COMES WITHIN THE JUDICIAL POWER OF THE FEDERAL COURTS

This litigation is not merely a dispute between two executive officers over preferred policy, or even over an interpretation of a statute. The courts have not been called upon to render an advisory opinion upon some abstract or theoretical question. Rather, in the context of the most concrete and vital kind of case—the federal criminal prosecution of former White House officials, styled *United States* v. *Mitchell, et al.*—the Special Prosecutor as the attorney for the United States has resorted to a traditional mechanism to procure evidence for the government's case at trial—a subpoena—in the face of the unwillingness of a distinct party or entity—the President—to furnish the evidence voluntarily. In objecting to the enforcement of the subpoena, the President has raised a classic question of law—a claim of privilege—and the United States, through its counsel, is opposing that claim. Thus, viewed in practical terms, it would be hard to imagine a controversy more appropriate for judicial resolution and more squarely within the jurisdiction of the federal courts. This Court is called upon to review questions that are well "within the traditional role accorded courts to interpret the law." *Powell* v. *McCormack,* 395 U.S. 486, 548; see, *e.g., Roviaro* v. *United States,* 353 U.S. 53; *United States* v. *Reynolds,* 345 U.S. 1.

Ever since *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137, it has been settled that, as long as a ffederal court is properly vested with subject-matter jiurisdiction,[19] it has the judicial power to render an authoritative, binding decision on the rights, powers, and duties of the other two branches of governmentt. See, *e.g.*, *Youngstown Sheet & Tube Co.* v. *Sawyeer*, 343 U.S. 579; *United States* v. *United States Disstrict Court*, 407 U.S. 297; *Kendall* v. *United States ex rel. Stokes*, 12 Pet. (37 U.S.) 524; *Kilbourn* v. *Thoompson*, 103 U.S. 168; *Doe* v. *McMillan*, 412 U.S. 306. This judicial power extends fully to disputes between representatives of the other two branches, *ee.g.*, *United States* v. *Brewster*, 408 U.S. 501; *Graveel* v. *United States*, 408 U.S. 606; *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, —— F. 2d —— (D.C. Cir. No. 74–1258) (May 23, 1974), as well as to disputes within one of those otheer branches, *e.g.*, *Powell* v. *McCormack*, *supra*; *Servicee* v. *Dulles*, 354 U.S. 363; *Sampson* v. *Murray*, —— U.S. —— (42 U.S.L.W. 4221, February 19, 1974).

As we shall discuss below, the fact that the President and the Special Prosecutor (on behhalf of the United States) are the legal adversaries in this phase of the controversy in no way undermines thhe existence of the judicial power to adjudicate the legal rights and duties at issue—namely, the existence *vel non* of

[19] The district court's subject-matter jurisdictiion over the pending criminal case and over the trial subpoena *duces tecum* issued in this case is clear. See 18 U.S.C. 32331; Rule 17, Federal Rules of Criminal Procedure.

a privilege to withhold evidence from a criminal trial pending in the federal court.

B. THE UNITED STATES, REPRESENTED BY THE SPECIAL PROSECUTOR, IS A PARTY DISTINCT FROM THE PRESIDENT

We begin by making the fundamental point, overlooked by counsel for the President, that federal criminal prosecutions are brought in the name of the United States of America as a sovereign nation. Despite his extensive powers and even his status as Chief Executive and Chief of State, the President, whether in his personal capacity or his official capacity, is distinct from the United States and is decidedly *not* the sovereign. Although the Constitution vests the executive power generally in the President (Art. II, Sec. 1), it expressly contemplates the establishment of executive departments which will actually discharge the executive power, with the President's function necessarily limited to "take Care that the Laws be faithfully executed" by other officers of the government (Art. II, Sec. 3). Thus, Article II, Section 2 expressly provides that, instead of giving the President power to appoint (and, perhaps, remove) "inferior Officers" of the Executive Branch, "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, * * * in the Courts of Law, or in the Heads of Departments."

Congress has organized the Department of Justice and provided that the Attorney General is its head. 28 U.S.C. 501, 503. Under Article II, Section 2, Congress has vested in him alone the power to appoint subordinate officers to discharge his powers. 28 U.S.C.

509, 510, 515, 533. Among the responsibilities given by Congress to the Attorney General is the authority to conduct the government's civil and criminal litigation (28 U.S.C. 516):

> Except as otherwise authorized by law, the conduct of litigation *in which the United States,* an agency, or officer thereof *is a party,* or is interested, *and securing evidence therefor,* is reserved to officers of the Department of Justice, under the direction of the Attorney General. (Emphasis added.)

As this Court has recognized, this section and companion provisions, see 28 U.S.C. 515–519, "impose on the Attorney General the authority and the duty to protect the Government's interests through the courts." *United States* v. *California,* 332 U.S. 19, 27–28. Under this framework it is not the President who has personal charge of the conduct of the government's affairs in court but, rather, it is the Attorney General acting through the officers of the Department of Justice appointed by him. This Court underscored the special status of the officers of the Department of Justice before the courts in *Berger* v. *United States,* 295 U.S. 78, 88, explaining that the federal prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty. * * * As such, he is in a peculiar and a very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."

Thus, as the district judge below pointedly recognized (Pet. App. 19), the subpoena *duces tecum* issued

by the prosecution to the President is directed to a person who "as a practical matter, is a third party."[20]

It was in the capacity as attorney for the United States that the Special Prosecutor invoked the judicial process. Exercising his exclusive authority under 28 U.S.C. 516 to secure evidence for a pending criminal prosecution within his jurisdiction, the Special Prosecutor is seeking evidence from an adverse party—evidence which the Special Prosecutor has reason to believe is highly material to the trial. Under the law, the Special Prosecutor speaks for the United States in conducting this criminal trial, and under the applicable statutes and regulations he has authority, which can be enforced by the courts, to seek evidence even from the President. Not only is this authority expressly included in the Department of Justice regulations defining his powers (Appendix pp. 146–50, *infra*), but the record shows that the President personally acceded to the arrangement whereby his asser-

---

[20] District Judge Gesell, who is presiding over the trial in *United States* v. *Ehrlichman, et al.* (D.D.C. Crim. No. 74–116), which involves charges against former White House officials growing out of the break-in at the offices of Dr. Louis Fielding, Daniel Ellsberg's psychiatrist, has recognized the independent status of the Special Prosecutor and the peculiar and unique circumstances that surround prosecutions within his jurisdiction:

"In one view of the matter, one portion of the Government is prosecuting another portion of the Government. Thus perhaps very unique circumstances are presented that require trial judges to use common sense to adapt criminal procedures and rules developed under more routine circumstances to the peculiar necessities of this special situation."

Transcript of Hearing on June 3, 1974, at 7–8, *United States* v. *Ehrlichman, et al, supra.*

tion of privilege would not preclude the Special Prosecutor, in a proper case, from invoking the judicial process to litigate the validity of the claim.

Before agreeing to accept appointment as the new Special Prosecutor, Mr. Jaworski obtained an assurance from the President's chief of staff, General Alexander Haig, who had conferred with the President, that there would be no bar to his resorting to judicial process, if necessary, to fulfill his responsibilities as he viewed them.[21] The Acting Attorney General, who appointed the Special Prosecutor, was fully apprised

[21] Mr. Jaworski testified as follows, under oath, before the Senate Committee on the Judiciary, which was considering legislation concerning establishment of an independent Special Prosecutor's office:

"* * * And when I came to Washington I first met with General Haig for probably an hour or an hour and a half, during which time this matter was discussed in detail. And as a result of that discussion, there eventuated the arrangement that we have mentioned.

"General Haig assured me that he would go and talk with the President, place the matter before him. And he came back and told me after a while, after maybe a lapse of 30 minutes or so, that it had been done, and that the President had agreed.

"The CHAIRMAN. You are absolutely free to prosecute anyone; is that correct?

"Mr. JAWORSKI. That is correct. And that is my intention.

"The CHAIRMAN. And that includes the President of the United States?

"Mr. JAWORSKI. It includes the President of the United States.

* * * * *

"Senator MCCLELLAN. May I ask you now, do you feel that with your understanding with the White House that you do have the right, irrespective of the legal issues that may be involved—that you have an understanding with them that gives you the right to go to court if you determine that they have documents you want or materials that you feel are essential and necessary in the performance of your duties, and in conducting a thorough investigation and following up with prosecution thereon, *you have the right to go to court to raise the issue against the President and against any of his staff with respect to such documents or materials and to contest the question of privilege.*

"Mr. JAWORSKI. *I have been assured that right.* And I intend to exercise it if necessary." (Emphasis added.)

Hearings Before the Senate Judiciary Committee on the Special Prosecutor, 93d Cong., 1st Sess., pt. 2, at 571, 573 (1973).

of the understanding. He testified as follows before the Senate Judiciary Committee:

> Although it is anticipated that Mr. Jaworski will receive cooperation from the White House in getting any evidence he feels he needs to conduct investigations and prosecutions, it is clear and understood on all sides that *he has the power to use judicial processes to pursue evidence if disagreement should develop.* (Emphasis added.) [22]

He also assured the House Subcommittee on Criminal Justice: "I understand and it is clear to me that Mr. Jaworski can go to court and test out" any refusal to produce documents on the ground of confidentiality.[23]

Similarly, the President's nominee to be Attorney General, William Saxbe, testified that the Special Prosecutor would have "sole discretion" in deciding whether to contest an assertion of executive privilege by the President and stated "he can go to court at any time to determine that." [24] Significantly, neither the

[22] *Id.*, at 450. See also *id.*, at 470.

[23] *Hearings Before the House Judiciary Subcommittee on Criminal Justice on H.J. Res. 784 and H.R. 10937*, 93d Cong., 1st Sess. 266 (1973).

[24] *Hearings Before the Senate Judiciary Committee on the Nomination of William B. Saxbe to be Attorney General*, 93d Cong., 1st Sess. 9 (1973).

President, nor his counsel, nor Acting Attorney General Bork has ever disavowed the assurances given. In fact, in announcing the appointment of a new Special Prosecutor on October 26, 1973, President Nixon stated (9 Weekly Compilation of Presidential Documents (Oct. 29, 1973)):

> And I can assure you ladies and gentlemen, and all our listeners tonight, that I have no greater interest than to see that the new special prosecutor has the cooperation from the executive branch *and the independence that he needs to* bring about that conclusion [of the Watergate investigation]. (Emphasis added.)

The regulations governing the Special Prosecutor's jurisdiction and independence, together with the Presidential assurances given to the public directly and to the Special Prosecutor through General Haig, reflect the public demand for an independent prosecutor not subject to the direct or indirect control of the President and not dependent upon the discretion of the President for access to information upon which to base investigations and prosecutions.[25] From the first, the regulations establishing and then reestablishing the Office of the Watergate Special Prosecution Force[26] have had the force and effect of law, *e.g.*,

[25] After the appointment of the new Special Prosecutor with these assurances of independent authority, *inter alia*, to contest in court any Presidential claims of executive privilege, both Houses of Congress tabled bills that would have provided for court appointment of a Special Prosecutor pursuant to Article II, Section 2. See note 13, *supra*.

[26] The authority of the Attorney General to issue the regulations is conferred by 28 U.S.C. §§ 509, 510 and 5 U.S.C. § 301. The legality of these regulations delegating the authority of the

Vitarelli v. *Seaton*, 359 U.S. 535; *Service* v. *Dulles*, *supra*; *Accardi* v. *Shaughnessy*, 347 U.S. 260; *Nader* v. *Bork*, *supra*, and empower the Special Prosecutor to contest the assertion of Executive Privilege in any case within his jurisdiction when he, not the President, concludes the assertion is unwarranted. See *Accardi* v. *Shaughnessy*, *supra*, 347 U.S. at 266–67.

This Court has held that, by virtue of their office, public officials necessarily have a sufficient "personal stake in the outcome" of any litigation that challenges the performance of their duties on constitutional grounds. See, *e.g.*, *Board of Education* v. *Allen*, 392 U.S. 236, 241 n. 5; *Coleman* v. *Miller*, 307 U.S. 433, 437–45. It follows, therefore, that under applicable statutes and regulations the Special Prosecutor has standing to take all necessary steps in court to promote the conduct of the cases under his jurisdiction, including the litigation of claims of "executive privilege" advanced as a reason for withholding evidence considered important to one of those prosecutions.

C. THE SPECIAL PROSECUTOR HAS AUTHORITY TO SEEK, AND THE FEDERAL COURTS HAVE POWER TO GRANT, A PRODUCTION ORDER ADDRESSED TO THE PRESIDENT EVEN THOUGH THE SPECIAL PROSECUTOR IS A MEMBER OF THE EXECUTIVE BRANCH

What has been shown above makes clear the authority of the Special Prosecutor to bring such prosecutions as are within his jurisdiction and to seek court

Attorney General has been sustained in *Nader* v. *Bork*, *supra*; *United States* v. *Andreas*, — F. Supp. — (D. Minn. No. 4–73–Cr. 201) (March 12, 1974); *United States* v. *Ehrlichman*, — F. Supp. — (D.D.C. Crim. No. 74–116) (May 21, 1974).

orders for the production of such evidence as is necessary to the litigation. We have shown that, in so discharging his duties, the Special Prosecutor does not act as the mere agent-at-will of the President. He enjoys an independent authority derived from constitutional delegations of authority by the Congress to the Attorney General and from the Attorney General to him under valid regulations that reflect the solemn commitments of the President himself.

Since the Special Prosecutor has authority to bring prosecutions and to seek production of evidence and does not take such actions in the President's name or at his behest, and since, as we show in Part II of our argument below, the President can, in an appropriate case, be ordered to produce evidence, there would seem to be no obstacle to the Special Prosecutor's seeking an order that the President produce evidence. The proceedings surrounding such an order constitute a justiciable controversy whether or not the President could, through a complicated series of steps, lawfully replace the Special Prosecutor and despite the somewhat unusual appearance on opposite sides of two parties both of whom are members of the Executive Branch.

1. Whatever power the President may have to circumvent an adverse ruling by taking steps to abrogate the Special Prosecutor's independence cannot serve to render the controversy nonjusticiable

The mere fact that the President is Chief Executive, with ultimate responsibility to "take Care that the Laws be faithfully executed," does not destroy the Special Prosecutor's independence or standing to sue.

Whatever might be the situation in a proceeding conducted by a mere agent of the President, the Special Prosecutor's functional and legal independence empowers him, on behalf of the United States, to seek a subpoena against the President for evidence.

Congress frequently confers powers and duties upon subordinate executive officials, and in such situations the President's function as Chief Executive does not authorize him to displace the designated officer and to act directly in the matter himself. As long as the officer holds his position, the power to act under the law is his alone. A familiar example of this basic principle was illustrated by President Andrew Jackson's legendary battle over the Bank of the United States. Two Secretaries of the Treasury refused to obey the President's command to withdraw deposits from the Bank, a function entrusted to the Secretary by law. The President's only recourse was to seek a third, who complied with Jackson's wish. See generally Van Deusen, *The Jacksonian Era,* 1828–1848, pp. 80–82 (1959). Attorney General Roger Taney gave a similar opinion to President Jackson, advising him that as long as a particular United States Attorney remained in office, he was empowered to conduct a particular litigation as he saw fit, despite the wishes of the President. See 2 Op. Att'y Gen. 482 (1831).

More recently, President Nixon apparently recognized a similar limitation on his powers as Chief Executive when, in order to effect the discharge of the former Special Prosecutor over the refusal of Attorney General Richardson and Deputy Attorney General Ruckelshaus to dismiss him, the President had to pro-

550-718—74——4

cure the removal of those officials and rest upon Acting Attorney General Bork's exercise of their power.

These principles, considered in light of the authority of the Special Prosecutor reviewed above, establish that, short of finding some way to accomplish the removal of the Special Prosecutor, the President has no legal right or power to limit or direct his actions in bringing prosecutions or in seeking the evidence needed for these prosecutions. Any effort to interefere in the Special Prosecutor's decisions is inadmissible and any order would be without legal effect so long as the Attorney General has not effectively rescinded the regulations creating and guaranteeing the Special Prosecutor's independence—a course he may be legally barred from taking without the Special Prosecutor's consent, see *Nader* v. *Bork, supra,* 366 F. Supp. at 108. Even then any order would have to come from the Attorney General to satisfy statutory requirements.

The President is bound by duly promulgated regulations even where he has power to amend them for the future. *Accardi* v. *Shaughnessy,* 347 U.S. at 266–67. It is even clearer in the present situation that regulations and statutes which he has no power to modify prevent him from assuming direction of the Watergate prosecutions. Thus, there can be no argument that a case or controversy is lacking because the President could dismiss the prosecution or withdraw the subpoena even if he so desired.

Nor is any valid objection to the concrete reality of this dispute furnished by the hypothesis, *arguendo,* that the President could nullify any adverse ruling by

procuring the dismissal of the Special Prosecutor and finding another prosecutor who would not enforce the Court's decision. A similar argument was rejected well over a century ago. In *Kendall* v. *United States ex rel. Stokes,* 12 Pet. (37 U.S.) 524, it was argued that the Judiciary lacked power to issue a mandamus requiring the Postmaster General to credit a sum of money to a contractor on the ground that the President would frustrate performance of the decree by discharging the respondent and appointing a new Postmaster General. The Court rejected the argument and granted mandamus. The federal courts have continued to resolve legal controversies despite the theoretical power of one of the parties to avoid the impact of the judgment by lawful means. See, *e.g., Glidden Co.* v. *Zdanok,* 370 U.S. 530.

The same argument against jurisdiction fails in the present case, not only on the basis of precedent, but for three other reasons as well.

First, in the present situation, the President does not have the power to remove the Special Prosecutor and to appoint a replacement more to his liking. Under Article II, Section 2 of the Constitution, Congress has vested appointment of officers of the Department of Justice, like the Special Prosecutor, in the Attorney General, not the President.[27] And the

[27] The locus of the appointment power may also fix the authority to remove, *United States* v. *Perkins,* 116 U.S. 483, although the removal power itself is not absolute. *Humphrey's Executor* v. *United States,* 295 U.S. 602; *Wiener* v. *United States,* 357 U.S. 349; *Myers* v. *United States,* 272 U.S. 52.

President explicitly has ceded any right and power he may have to restrict the independence of the Special Prosecutor or effect his discharge by agreeing to the issuance of regulations precluding such action unless the "consensus" of eight specified Congressional officials concurs in that course. The regulations establishing this condition precedent to any action by the President have the force of law, and the Special Prosecutor thus stands before the Court independent of any direct control by the Attorney General or the President. In short, the present regulations governing the Special Prosecutor's tenure and independence are even more restrictive of the residual authority of the President and the Attorney General than were the regulations that were held in *Nader* v. *Bork, supra,* to have been violated by the dismissal of Special Prosecutor Cox.[28]

Second, even the dismissal of the Special Prosecutor would not nullify a ruling that the evidence must be produced, since the Attorney General and the Solicitor General, as officers of this Court, would be legally

[28] The regulations also provide that the Special Prosecutor's office will not be abolished without the consent of the Special Prosecutor and that the Attorney General will not countermand any decisions of the Special Prosecutor (see Appendix pp. 149, 151, *infra*). Judge Gesell in *Nader* v. *Bork, supra,* 336 F. Supp. at 108, indicated that those guarantees are legally binding and not unilaterally revocable.

This Court has recognized, of course, that the President's power to remove subordinate officers of the government, even those in the Executive Branch, is not unlimited, and may be non-existent when the executive official exercises some "duties of a quasi-judicial character." *Myers* v. *United States, supra,* 272 U.S. at 135. See also *Humphrey's Executor* v. *United States, supra; Wiener* v. *United States, supra.*

obliged to attend to the proper enforcement of a decree by the Court, particularly one in favor of the United States. See *United States* v. *Shipp,* 203 U.S. 563; *United States* v. *Shipp,* 214 U.S. 386 (proceedings for criminal contempt initiated and conducted before this Court by Attorney General for defiance of Court's order); 28 U.S.C. 518(a).

Third, the speculative possibility that something might occur in the future cannot render a presently live controversy moot, when it is hardly inevitable that the Court's decision will be ineffective. Compare *DeFunis* v. *Odegaard,* —— U.S. —— (42 U.S.L.W. 4578, April 23, 1974). Just as "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.,* does not make the case moot," *United States* v. *W.T. Grant Co.,* 345 U.S. 629, 632, it follows *a fortiori* that the hypothetical—and possibly illegal—dismissal of the Special Prosecutor after a decision in his favor by this Court cannot render the present case moot. As this Court noted earlier this Term in rejecting a mootness claim involving a challenge to state welfare benefits to striking workers where the particular strike had ended: "The judiciary must not close the door to the resolution of the important questions these concrete disputes present." *Super Tire Engineering Co.* v. *McCorkle,* —— U.S. ——(42 U.S.L.W. 4507, 4511, April 16, 1974). In the present case, the precise controversy is still very much alive, and the President has not even threatened to attempt to defeat an adverse ruling by effecting the dismissal of the Special Prosecutor.

2. There is no lack of a true case or controversy because the opposing parties are both members of the Executive Branch

In the present matter, there can be no seriouss contention that this is a feigned or collusive suit for an abstract or speculative debate; the issues are shaarply drawn over the production or nonproduction off specific evidence for a pending criminal trial, and thee litigants—the United States and President Nixon—have manifestly concrete but antagonistic interests in the outcome, for if the subpoenaed materials are ordered produced the United States can proceed to triall in a major criminal case armed with important evidence, while a contrary decision would leave President Nixon in absolute control over those materials and thereby weaken the government's case against his former aides, whom he has publicly supported in this criminal investigation (see pp. 59–60, *infra*).

Thus, we submit that it is clear beyond peradventure that the Special Prosecutor, as the exclusively authorized attorney for the United States—the prosecuting sovereign in the pending criminal casse of *United States* v. *Mitchell, et al.*, for which the instant trial subpoena was issued—has standing to seek enforcement of the subpoena, for the prosecution has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204. See also *Flast* v. *Cohen*, 392 U.S. 83, 98–100.

Framing this controversy as a mere "intra-executive branch" dispute, as counsel for the Presidentt did

below, seems to invoke the sterile conceptualism, long ago discarded, that since "no person may sue himself," suits between government officials cannot be maintained. As this Court said when it rejected such an argument in *United States* v. *ICC*, 337 U.S. 426, 430, "courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented."[29] See also *Secretary of Agriculture* v. *United States*, 350 U.S. 162. This practical approach was underscored only this Term, when the Court noted probable jurisdiction and heard argument in two cases in which the United States, represented by the Justice Department, was appealing from two separate district court decisions dismissing the government's complaints attacking bank mergers under Section 7 of the Clayton Act. *United States* v. *Marine Bancorporation, Inc.*, No. 73–38; *United States* v. *Connecticut National Bank*, No. 73–767. The Comptroller of the Currency has responsibility for administering the Bank Merger Act and the National Bank Act, and in each case the Comptroller had approved a merger challenged by the Department of Justice under the Clayton Act. In each case the Comptroller of the Currency, an official of the Treasury Department, 12 U.S.C. § 1, 2, was named as an appellee and filed a brief in opposition to the position

[29] Judge Holtzoff had held that the suit there had to be dismissed because "the United States of America always acts in a sovereign capacity. It does not have separate governmental and proprietary capacities." *United States* v. *ICC*, 78 F. Supp. 580, 583 (D.D.C. 1948). This Court reversed.

taken by the Solicitor General on behalf of the Department of Justice. Although such litigation is relatively rare and typically involves disputes between an executive department and a "quasi-independent" regulatory agency, there is nothing in the "case or controversy" requirement of Article III that denies the federal courts the power to adjudicate concrete controversies between government officials over their respective legal powers and duties, see *e.g., Powell* v. *McCormack, supra,* particularly when—as in the present case—the resolution of the legal controversy has direct consequences upon them and private parties.

We do not suggest, of course, that the President or the Department of Justice could confer jurisdiction on the courts where such jurisdiction is constitutionally impermissible. What we do argue, however, is that the Court must look beyond the President's formalistic objections to the Court's jurisdiction, based as they are on a talismanic incantation of the "intra-executive" nature of the proceeding. By pointing to the mere formality of the Special Prosecutor's status as an executive officer, counsel to the President ignores the substantive concern underlying the "case or controversy" requirement of Article III. A proceeding is justiciable if it presents live, concrete issues between adverse parties that are susceptible of adjudication. See, *e.g., O'Shea* v. *Littleton,* —— U.S. —— (42 U.S.L.W. 4139, January 15, 1974); *United States* v. *SCRAP,* 412 U.S. 669, 687; *Flast* v. *Cohen,* 392 U.S. 83, 94–101; *Baker* v. *Carr,* 369 U.S. 186, 204. And it is against these standards that the Court must resolve the objections to its jurisdiction.

Although counsel for the President has argued that somehow the "separation of powers" principle denies to the federal courts the power to decide this controversy between the President and the prosecution in *United States* v. *Mitchell,* this argument will not withstand analysis. The inescapable irony of the President's position can only be appreciated by focusing on the fact that the regulations creating a Special Prosecutor's office armed with functional independence and with explicit authority to litigate against Presidential claims of privilege do not reflect a statutory regime imposed by the Legislative Branch; these regulations were promulgated with the President's approval by his Attorney General. This, then, is the President's position—not that Congress has unconstitutionally invaded his sphere, but rather that the doctrine of separation of powers forecloses *him* from the ability to control his "own" Executive Branch in such a way as to safeguard public confidence in the integrity of the law enforcement process. The Office of the Watergate Special Prosecution Force was established with the approval of the President as an independent entity within the Department of Justice in response to the public demand for an impartial investigation of charges of criminal misconduct by officials in the Executive Office of the President. After Special Prosecutor Cox's dismissal, the Office was re-established amid a public reaction so severe that it has generated the first serious possibility of a Presidential impeachment in more than a century and made enactment of legislation for a court-appointed

Special Prosecutor almost certain.[20] Perhaps the most important assurance of independence built into the proposed role of the Special Prosecutor, as reflected in congressional testimony[21] as well as public statements by the President and the Attorney General, was his authority to invoke the judicial process to obtain necessary evidence from the President. It simply stands the doctrine of separation of powers on its head to suggest that it precludes the Judiciary from giving full force and effect to the allocation of authority within the Executive Branch under an arrangement that was designed by the Attorney General and approved by the President as indispensible to forestall a further erosion of faith in the Executive Branch.

D. THE SPECULATIVE POSSIBILITY THAT THE PRESIDENT MAY DISREGARD A VALID COURT ORDER DOES NOT DEPRIVE THE COURT OF JURISDICTION

A theme advanced earlier by counsel for the President in opposition to enforcement of a grand jury subpoena *duces tecum* in *Nixon* v. *Sirica* was that the President has "the power and thus the privilege to withhold information."[22] This raw assertion in no way undermines the justiciability of this controversy. The naked power of the Chief Executive, despite a court order, to withhold evidence from a judicial proceeding does not deprive the courts of jurisdiction to

[20] See note 13, *supra*.

[21] *Hearings Before the Senate Judiciary Committee on the Special Prosecutor*, 93d Cong., 1st Sess., pt. 2, at 571, 573 (1973).

[22] Brief in Opposition p. 3, *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon*, 360 F. Supp. 1 (D.D.C. 1973).

order its production. To link physical power with legal privilege runs contrary to our entire constitutional tradition. As this Court stated in *Kendall* v. *United States ex rel. Stokes, supra,* 12 Pet. at 613, "[t]o contend that the obligation imposed on the President to see the laws are faithfully executed implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible." It might as well be said that a Secretary of State, acting upon orders of the President, would have had "the power and thus the privilege" to withhold the signed commission at issue in *Marbury* v. *Madison, supra;* or that a Postmaster General, acting upon instructions of the President, would have had "the power and thus the privilege" to refuse to pay money owed pursuant to a contract, contrary to the decision in *Kendall, supra;* or that the President has "the power and thus the privilege" to seize industrial property in a wartime labor dispute, contrary to *Youngstown Sheet & Tube Co.* v. *Sawyer, supra;* or to conduct warrantless electronic surveillance in domestic security investigations, contrary to the Fourth Amendment as interpreted in *United States* v. *United States District Court, supra.*

This Court has never allowed doubt about its physical power to enforce its commands to deter the issuance of appropriate orders. In *Worcester* v. *Georgia,* 6 Pet. (31 U.S.) 515, counsel strenuously argued that the Court should not order Georgia to surrender jurisdiction over a prisoner seized in Cherokee Indian territory because the President would not and the Court could not force Georgia to obey the judicial command,

but the Court did not abdicate its responsibility to decide the issues. In *McPherson* v. *Blackmer,* 146 U.S. 1, 24, the Court ruled upon the constitutionality of a Michigan statute providing for the choice of Presidential electors by congressional districts despite the argument that the State's political agencies might frustrate the decision, saying:

> The question of the validity of this act, as presented to us by this record, is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the state as revised by our own.

Most recently in *Glidden Co.* v. *Zdanok, supra,* the Court rejected the argument that a money claim against the United States did not present a justiciable issue because the courts were without power to force execution of a judgment against the United States: "If this Court may rely on the good faith of state governments or other public bodies to respond to its judgments, there seems to be no sound reason why the Court of Claims may not rely on the good faith of the United States." 370 U.S. at 571.[33] In conformity with this principle, the court of appeals in *Nixon* v. *Sirica* rejected the attempt to equate physical power to disobey with legal immunity from the judicial process itself: "The legality of judicial orders should not be

[33] See also *Powell* v. *McCormack, supra,* 395 U.S. at 517–18; *Baker* v. *Carr, supra,* 369 U.S. at 208–37; *South Dakota* v. *North Carolina,* 192 U.S. 286, 318–21; *La Abra Silver Mining Co.* v. *United States,* 175 U.S. 423, 461–62.

confused with the legal consequences of their breach; for the courts of this country always assume that their orders will be obeyed, especially when addressed to responsible government officials." *Nixon* v. *Sirica, supra,* 487 F. 2d at 711–12.

The effect of a President's physical power to disobey a court order is wholly speculative at this juncture and undoubtedly will remain so. There is no reason to believe that President Nixon would disregard a decision of this Court fixing legal responsibilities, any more than he did the order of the district court, as modified by the court of appeals in *Nixon* v. *Sirica, supra,* requiring him to submit for *in camera* inspection recordings subpoenaed by the grand jury. In announcing that President Nixon would comply with the mandate in *Nixon* v. *Sirica,* counsel for the President stated in open court: "This President does not defy the law, and he has authorized me to say he will comply in full with the orders of the court."[34]

The Court, therefore, can cast aside as wholly illusory any of the obstacles that may be suggested as barring its exercise of the judicial power of the United States to decide the evidentiary privilege issue interposed in this criminal case. The case is within the jurisdiction of the federal courts and is fully justiciable.

[34] Transcript of Hearing on October 23, 1973, *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon, supra,* D.D.C. Misc. No. 47–73.

I. THE COURTS HAVE BOTH THE POWER AND THE DUTY TO DETERMINE THE VALIDITY OF A CLAIM OF EXECUTIVE PRIVILEGE WHEN IT IS ASSERTED IN A JUDICIAL PROCEEDING AS A GROUND FOR REFUSING TO PRODUCE EVIDENCE

A. THE COURTS HAVE THE POWER TO RESOLVE ALL ISSUES IN A CONTROVERSY PROPERLY BEFORE THEM, EVEN THOUGH THIS REQUIRES DETERMINING, AUTHORITATIVELY, THE POWERS AND RESPONSIBILITIES OF THE OTHER BRANCHES

Our basic submission, and the one we suggest controls this case, is a simple one—the courts, in the exercise of their jurisdiction under Article III of the Constitution, have the duty and, therefore, the power to determine all issues necessary to a lawful resolution of controversies properly before them. The duty includes resolving issues as to the admissibility of evidence in a criminal prosecution as well as the obligation to produce such evidence under subpoena. This allocation of responsibility is inherent in the constitutional duty of the federal courts, as the "neutral" branch of government, to decide cases in accordance with the rule of law, and it supports rather than undermines the basic separation of powers conceived by the Constitution.

The principle was clear at the very outset of our constitutional history. Since 1803 there has been no question that in resolving any case or controversy within the jurisdiction of a federal court, "[i]t is emphatically the province and the duty of the judicial department to say what the law is." *Marbury* v. *Madison, supra,* 1 Cranch at 177. See *Powell* v. *McCormack, supra,* 395 U.S. at 521. As *Marbury* v. *Madison* firmly establishes, this is true even though the controversy

before the courts implicates the powers and responsibilities of a co-ordinate branch. In conformity with this principle the courts consistently have exercised final authority to determine whether even the highest executive officials are acting in accordance with the Constitution and have issued appropriate decrees to implement those judicial decisions. *E. g., Youngstown Sheet & Tube Co.* v. *Sawyer, supra* (alleged right of President to authorize the Secretary of Commerce to seize steel mills); *United States* v. *United States District Court, supra* (alleged power of the President, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval); *Kendall* v. *United States ex rel. Stokes, supra* (alleged power of the President, acting through the Postmaster General, to withhold money owed pursuant to a contract); *Land* v. *Dollar,* 190 F. 2d 623 (D.C. Cir. 1951), vacated as moot, 344 U.S. 806 (alleged right of Secretary of Commerce and Acting Attorney General to obey order of President inconsistent with judicial decree; officials adjudicated in civil contempt).

The courts have not retreated from this responsibility even when the most pressing and immediate needs of the Nation were at issue. President Truman directed the Secretary of Commerce to seize and operate specified steel facilities because of his judgment that a threatened work stoppage at the Nation's steel mills during the Korean War "would immediately jeopardize and imperil our national defense." Executive Order No. 10340 (April 8, 1952). Nevertheless, this

Court ruled that the President had exceeded his constitutional powers and upheld a preliminary injunction enjoining the seizure. Justice Jackson's concurring opinion expresses the fundamental principle underlying the Court's decision (343 U.S. at 655):

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law.

Even Justice Frankfurter, one of the most ardent exponents of the separation of powers, who expressed "every desire to avoid judicial inquiry into the powers and duties of the other two branches of government," concurred in the judgment of the Court, albeit "with the utmost unwillingness." He recognized: "To deny inquiry into the President's power in a case like this, because of the damage to the public interest to be feared from upsetting its exercise by him, would in effect always preclude inquiry into challenged power * * *." 343 U.S. at 596.

It is too late in our history to contend that this duty and competence of the Judiciary is inconsistent with the separation of powers, either in general or as applied to questions of evidentiary privilege. As the court of appeals held in *Nixon* v. *Sirica, supra,* 487 F. 2d at 715, such a claim, premised on the contention that the separation of powers prevents the courts from compelling particular action from the President or from reviewing his determinations, mistakes the true nature of our constitutional system. Focusing on the "separation" of functions in our tri-partite system of government obscures a crucial point: the exercise by one branch of constitutional powers within its own competence frequently requires action by another branch within its field of powers. Thus, the Legislative Branch has the power to make the laws. Its enactments bind the Judiciary—unless unconstitutional—not only in the decision of cases and controversies, but in the very procedures through which the Judiciary transacts its business.[35] Congress, in scores of statutes, regularly imposes legal duties upon the President.[36] The very essence of his constitutional function is the legal duty to carry out congressional mandates by taking "Care that the Laws be faithfully executed." Finnally, the President may require action by the courts. The courts, for example, have a legal duty to give—and do give—effect to valid executive orders.[37] Where the President or an appropriate official institutes a legal action in his own name or that of the United States, a judge is compelled to grant the relief requested if in accordance with law.

We enjoy a well-functioning constitutional government because each branch is independent and yet acknowledges its duties in response to the functioning of others. "Checks and balances were established in order

---

[35] See, *e.g.*, 28 U.S.C. 2, 44(c), 45, 47, 48, 134(b), 144, 331, 332, 333, 455, 1731–1745, 1826(b), 1863, 2102, 2254(b), 2284(4), 2403; 18 U.S.C. 2519, 3006A, 3331(a), 6003(a), 6005(a).

[36] See, *e.g.*, *National Treasury Employees Union* v. *Nixon*, 492 F. 2d 587, 603 (D.C. Cir. 1974) (holding the President was obliged to submit a federal employee pay increase as required by Congress).

[37] See, *e.g.*, *Environmental Protection Agency* v. *Mink*, 410 U.S. 73 (security classification).

550-718—74——5

that this should be a 'government of laws and not of men.' * * * The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power." *Myers* v. *United States*, 272 U.S. 52, 292–93 (Brandeis, J., dissenting). At the same time, as Mr. Justice Jackson explained in *Youngstown Sheet & Tube Co.* v. *Sawyer, supra*, 343 U.S. at 635 (concurring opinion):

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

Thus, there is no room to argue that the separation of powers makes each branch an island, alone unto itself. Despite the "separation of powers implications, the separation of powers doctrine has not previously prevented this Court from reviewing the acts" of a coordinate branch of the government when placed in issue in a case within the jurisdiction of the federal courts. *Doe* v. *McMillan, supra*, 412 U.S. at 318 n. 12.

B. THE JUDICIAL POWER TO DETERMINE THE LIMITS OF EXECUTIVE AUTHORITY WHEN NECESSARY TO RESOLVE A JUSTICIABLE CONTROVERSY INCLUDES THE POWER TO RESOLVE CLAIMS OF EXECUTIVE PRIVILEGE MADE WITH REGARD TO EVIDENCE SOUGHT BY THE PROSECUTOR FOR USE IN A PENDING CRIMINAL CASE

In applying the fundamental principle that the Judiciary, and not the Executive, has the ultimate responsibility for interpreting and applying the law in any justiciable case or controversy, the courts consistently have determined for themselves not only what evidence is admissible, but also what evidence must be produced, including whether particular materials are appropriately subject to a claim of executive privilege. This issue, like questions of the constitutionality and meaning of statutes or executive orders, is one of the matters that a court has a duty to resolve authoritatively whenever their resolution is an integral part of the outcome of a case or controversy within the court's jurisdiction.[38]

[38] Because there is no legislative analogy to the historic judicial duty to determine all questions of law necessarily raised by a case or controversy, rejection of the claim of executive privilege in the present case does not necessarily suggest any answer to the distinct questions of the scope of the President's right to stand on a claim of executive privilege *vis-a-vis* the Congress or of the role, if any, of the courts in such a confrontation. History provides a great variety of opinions on the relative rights of the Executive and the Congress in such a situation. See generally Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A. L. Rev. 1043, 1078–98 (1965).

The Court of Appeals for the District of Columbia Circuit recently affirmed a decision of the district court refusing a declaratory judgment that a subpoena issued to the President by the Senate Select Committee on Presidential Campaign Activities was valid and enforceable. *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, —— F. 2d —— (No. 74–1258) (D.C. Cir. May 23, 1974). By deciding that the Committee's "need" for the subpoenaed recordings was "too attenuated and too tangential to its functions to permit a judicial judgment that the President is required to comply with the Committee's subpoena," thereby reaching the merits of the claim of executive privilege, the court held implicitly that the Committee's action presented a justiciable controversy. Cf. *Powell* v. *McCormack, supra*.

At one time it was generally assumed that a claim of executive privilege *vis-a-vis* the Congress presented a nonjusticiable political question. See, *e.g.*, L. Hand, The Bill of Rights 17–18

The question was decided squarely in *United States* v. *Reynolds*, 345 U.S. 1, where the Executive Branch argued that "department heads have power to withhold any documents in their custody from judicial view if they deem it to be in the public interest," 345 U.S. at 6 (footnote omitted)—a position strikingly similar to the one advanced by counsel for the President. The case involved a Tort Claims Act suit arising out of the crash of a B–29 bomber testing secret electronic equipment. The plaintiffs sought discovery of the Air Force's official accident investigation report and the statements of the surviving crew members. Although this Court agreed that an evidentiary privilege covers military secrets, 345 U.S. at 6–7, 11, it held that "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege * * *. Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." 345 U.S. at 8, 9–10 (footnote omitted). See also *Roviaro* v. *United States*, *supra*, 353 U.S. at 62.

Since the decision in *Reynolds*, every court of appeals that has confronted the question has rejected a claim of absolute executive privilege to withhold evidence merely upon the assertion by the Executive that disclosure would not be in the public interest. The Court of Appeals for the District of Columbia Circuit, for example, which has had the most frequent occasion to consider and discuss this issue, has noted

(1958). But no one has ever suggested that an application for an order requiring the Executive Branch to produce evidence in the usual course of judicial or grand jury proceedings presents a non-justiciable "political question."

that "this claim of absolute immunity for documents in the possession of an executive department or agency, upon the bald assertion of its head, is not sound law." *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F. 2d 783, 792 (1971). In recently reaffirming the validity of this decision, the court ruled *en banc* that judicial determination "is not only consistent with, but dictated by, separation of powers doctrine." *Nixon* v. *Sirica*, *supra*, 487 F. 2d at 714.[39]

Even in the first case that firmly recognized a confidentiality privilege for "intra-agency advisory opinions," *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939 (1958),[40] the Court of Claims, in an opinion by Justice Reed, held that documents reflecting executive deliberations "are privileged from inspection as against public interest *but not absolutely*. * * * The power must lie in the courts to determine executive privilege in litigation." 157 F. Supp.

[39] Accord. *Ethyl Corporation* v. *Environmental Protection Agency*, 478 F. 2d 47, 51 (4th Cir. 1973); *Carr* v. *Monroe Manufacturing Co.*, 431 F. 2d 384, 388 (5th Cir. 1970), cert. denied, 400 U.S. 1000; *Sperandeo* v. *Milk Drivers & Dairy Employees Local 537*, 334 F. 2d 381, 384 (10th Cir. 1964); *N.L.R.B.* v. *Capitol Fish Co.*, 294 F. 2d 868, 875 (5th Cir. 1961); *Halpern* v. *United States*, 258 F. 2d 36, 43 (2d Cir. 1958). See also *Pan American World Airways, Inc.* v. *Aetna Cas. & Sur. Co.*, 368 F. Supp. 1098, 1139–40 (S.D.N.Y. 1973); *United States* v. *Article of Drug, etc.*, 43 F.R.D. 181, 190 (D. Del. 1967); *O'Keefe* v. *Boeing Co.*, 38 F.R.D. 329, 334 (S.D.N.Y. 1965); *Timken Roller Bearing Co.* v. *United States*, 38 F.R.D. 57, 63 (N.D. Ohio 1964); *Morris* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 21 F.R.D. 155, 157–58 (W.D. Mo. 1957); *Snyder* v. *United States*, 20 F.R.D. 7, 9 (E.D.N.Y. 1956).

[40] See generally R. Berger, *Executive Privilege: A Constitutional Myth* 353–55 (1974).

at 946–47 (emphasis added). Thus, even in the embryonic stages of this relatively recently articulated version of "executive privilege," the courts recognized that the legitimate interests of the Executive do not require unreviewable discretion to shield its decision-making processes from scrutiny by the Judiciary. A similar conclusion has been reached by the courts of almost all other countries following the common law.[41]

In short, the President's assertion in the district court "that it is for the President of the United States, rather than for a court, to decide when the public interest requires that he exercise his constitutional privilege to refuse to produce information" flies in the face of an unbroken line of precedent.[42]

[41] In *Conway* v. *Rimmer*, [1968] 1 All E.R. 874, the House of Lords unanimously overruled the prior English rule that an assertion of executive (or "Crown") privilege is absolute: The House of Lords ruled that the courts may require *in camera* inspection to weigh the competing interests. See generally Cappelletti and Golden, *Crown Privilege and Executive Privilege: A British Response to an American Controversy*, 25 Stanford L. Rev. 836 (1973).

As the court of appeals noted in *Nixon* v. *Sirica*, *supra*, 487 F. 2d at 713–14, n. 60, judicial power to scrutinize claims of privilege has been recognized in nearly every common law jurisdiction. See, *e.g.*, *Robinson* v. *South Australia* (No. 2), [1931] All E.R. 333 (P.C.); *Gagnon* v. *Quebec Securities Comm'n*, [1965] 50 D.L.R. 2d 329 (1964); *Bruce* v. *Waldron*, [1963] Vict. L.R. 3; *Corbett* v. *Social Security Comm'n*, [1962] N.Z.L.R. 878; *Amar Chand Butail* v. *Union of India*, [1965] 1 India S. Ct. 243.

[42] This Court has not even afforded such status to the Speech or Debate Clause, which is an *express* constitutional privilege for congressmen and their aides similar to the privilege claimed by the President. This Court repeatedly has affirmed that the courts must determine the reach of the Clause. See, *e.g.*, *Gravel* v. *United States*, *supra*; *United States* v. *Brewster*, *supra*; *United States* v. *Johnson*, 319 U.S. 503.

The uniform precedent of allocating to the Judiciary the determination of the applicability and scope of executive claims of privilege not to produce necessary evidence is supported by compelling arguments of policy. Certainly, there are legitimate interests in secrecy. But these interests are more than adequately protected by the qualified privilege defined and applied by the courts.[43] This Court, as we have noted, has adverted to the danger of abdicating objective judicial discernment "to the caprice of executive officers," *United States* v. *Reynolds*, *supra*, 345 U.S. at 9–10, and stated that "complete abandonment of judicial control would lead to intolerable abuses." 345 U.S. at 8. This is necessarily true because the Executive has an inherent conflict of interest when its actions are called into question if it is to decide whether evidence is to remain secret. Thus, in *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, *supra*, the Court of Appeals for the District of Columbia Circuit has emphasized a related rationale for denying absolute executive discretion to assert a binding confidentiality privilege: "executive absolutism cannot override the duty of the court to assure that an official has not exceeded his charter or flouted the legislative

[43] The courts never have decided whether executive privilege derives implicitly from the constitutional separation of powers, or whether it is merely a common law evidentiary privilege. See, *e.g.*, *United States* v. *Reynolds*, 345 U.S. at 6–7; *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, *supra*, 463 F. 2d at 793–94. Professor Charles Alan Wright has observed that "[t]he commentators * * * have not found much substance in the constitutional argument, based, as it is, on separation of powers." 8 Wright and Miller, Federal Practice and Procedure, § 2019, at 175 n. 44 (1970 ed.).

will." 463 F. 2d at 792. The court presciently stated (463 F. 2d at 794):

> [N]o executive official or agency can be given absolute authority to determine what documents in his possession may be considered by the court in its task. Otherwise the head of any executive department would have the power on his own say so to cover up all evidence of fraud and corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law."

In a similar vein, the Court of Appeals for the Fifth Circuit recently noted:

> The granting or withholding of any privilege requires a balancing of competing policies, 8 Wigmore, § 2285 at 527–28. The claim of governmental privilege is no exception; in fact, the potential for misuse of government privilege, and the consequent diminution of information about government available to the public, is one more factor which strongly suggests the need

"The rationale is equally well summarized by Wigmore (§ 2379, at 809–10):

"A court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control if its applicability is left to the determination of the very official whose interest it may be to shield a wrongdoing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the court."

See also *United States* v. *Cotton Valley Operators Comm.*, 9 F.R.D. 719, 720–21 (W.D. La. 1949), aff'd by an equally divided Court, 339 U.S. 940.

> for judicial arbitration of the availability of the privilege.

Carr v. *Monroe Manufacturing Co., supra,* 431 F. 2d at 388.

We do not question the need for a qualified privilege to serve as an encouragement to the candid exchange of ideas necessary for the formulation of executive policy. Indeed, as the court of appeals held in *Nixon* v. *Sirica, supra,* 487 F. 2d at 717, such discussions are "presumptively privileged." But this case brings into high relief the dangers that would be posed by unbridled, absolute discretion to invoke executive privilege and underscores the wisdom of the rule vesting ultimate power in the courts to rule upon such claims when they are advanced in the context of judicial proceedings. President Nixon cannot be a proper judge of whether the greater public interest lies in disclosing the subpoenaed evidence for use at trial or in withholding it. He is now the subject of an impeachment inquiry by the Committee on the Judiciary of the House of Representatives, and the subpoenaed evidence may have a material bearing on whether he is impeached and, if impeached, whether he is convicted and removed from office. This is an issue to which he can hardly be indifferent. In addition, the Special Prosecutor, as prosecuting attorney for the United States, seeks the subpoenaed evidence in prosecuting the President's highest and closest aides and associates. The President is bound to them by the natural emotions of loyalty and gratitude. Thus, in

his Address to the Nation on April 30, 1973, announcing the resignation of defendants Haldeman and Ehrlichman, the President referred to them as "two of the finest public servants it has been my privilege to know." 9 Weekly Compilation of Presidential Documents 434 (May 7, 1973). And during a question-and-answer session between President Nixon and participants at the Associated Press Managing Editors Association annual convention on November 17, 1973, the President stated unequivocally: "* * * Mr. Haldeman and Mr. Ehrlichman had been and were dedicated, fine public servants, and I believe, it is my belief based on what I know now, that when these proceedings are completed that they will come out all right." 9 Weekly Compilation of Presidential Documents 1349 (November 26, 1973).

We call attention to these facts without disrespect to the President or his Office. But even if by extraordinary act of conscience, he could judge impartially the relative public advantages of secrecy and disclosure without regard to the consequences for himself or his associates, confidence in the integrity and impartiality of the legal system as between the high and the lowly still would be impaired through violation of the ancient precept that no man shall be a judge in his own cause. Compare *Ward* v. *Village of Monroeville,* 409 U.S. 57; *Mayberry* v. *Pennsylvania,* 400 U.S. 455; *Offutt* v. *United States,* 348 U.S. 11; 28 U.S.C. 455.

C. COURTS HAVE THE POWER TO ORDER THE PRODUCTION OF EVIDENCE FROM THE EXECUTIVE WHEN JUSTICE SO REQUIRES

When the court's duty to decide a case or controversy requires the court to determine the validity of a claim of executive privilege, the court has the concomitant power to order the production of the evidence from the Executive Branch when justice so requires. This Court's decision last Term in *Environmental Protection Agency* v. *Mink,* 410 U.S. 73, clearly establishes the proposition that the constitutional separation of powers does not give the Executive any constitutional immunity from judicial orders for the production of evidence. The plaintiffs there had sought access under the Freedom of Information Act to a report prepared for the President by the Undersecretaries Committee of the National Security Council on the proposed underground nuclear test on Amchitka Island. The government opposed the request partly upon the ground that the documents were exempt from disclosure as "inter-agency memorandums or letters,"[45] arguing that the need to avoid disclosure of communications with the President was "particularly important." Brief for the Petitioners 39–40. Nevertheless, this Court remanded for a judicial determination of the claim of privilege; the opinion states explicitly that in opposing disclosure the government carried the burden of establishing "to

[45] Although the Court dealt within the framework of the Freedom of Information Act, 5 U.S.C. 552(b)(5), it recognized that Congress simply had incorporated the common law executive privilege. 410 U.S. at 85–89. The exemption was defined with specific reference to the court decisions that had developed the privilege at issue here.

the satisfaction of the District Court" that the documents were exempt from disclosure. 410 U.S. at 93. Significantly, the Freedom of Information Act expressly provides that "[i]n the event of noncompliance with the order of the court" to disclose material found unprivileged, the court may punish the responsible executive officer "for contempt." 5 U.S.C. 552(a)(3). Neither in *Mink* nor in any other decision has any doubt been expressed about the constitutional power of the court to enter a mandatory order for the production of evidence after a claim of executive privilege has been overruled by the court.

Other precedents confirm the existence of judicial power to require the production of evidence by executive officials when the court determines the evidence to be material and unprivileged. *United States* v. *Burr,* 25 Fed. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807), of course, is an early and clear example involving evidence in the possession of the President sought for use in a federal criminal case. In *Bowman Dairy Co.* v. *United States,* 341 U.S. 214, 221, this Court treated contempt as a proper sanction against government counsel if he refused to obey a subpoena for the production of documents after the court rejected a claim of privilege. Similarly, while holding that an FBI agent could not properly be held in contempt for refusing to obey a subpoena to produce information for use in a state prisoner's habeas corpus action without permission from the Attorney General, the Court implicitly assumed, and Justice Frankfurter explicitly stated in his concurring opinion, that the Attorney

General himself could be required to litigate the underlying claim of privilege in court. *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462, 473. In private litigation the lower courts consistently have assumed the existence of power to enforce a subpoena for documents in the Executive Branch over a claim of privilege.[46]

Thus, Professor Charles Alan Wright, after explaining that—

> The determination whether to allow the claim of [executive] privilege is then for the court
> * * *

goes on to say that—

> In private litigation refusal of a government officer to comply with a court order overruling a claim of executive privilege and ordering disclosure could lead to conviction for contempt
> * * *.

8 Wright and Miller, Federal Practice and Procedure § 2019, at 171–72 (1970) (footnotes omitted).

---

[46] See, *e.g.*, *Westinghouse Electric Corp.* v. *City of Burlington,* 351 F. 2d 762 (D.C. Cir. 1965); *Machin* v. *Zuckert,* 316 F. 2d 336 (D.C. Cir. 1963), cert. denied, 175 U.S. 896; *Boeing Airplane Co.* v. *Coggeshall,* 280 F. 2d 654 (D.C. Cir. 1960); *Pan American World Airways, Inc.* v. *Aetna Cas. & Sur. Co.,* 368 F. Supp. 1098 (S.D.N.Y. 1973); *Pilar* v. *SS Hess Petrol,* 55 F.R.D. 159 (D. Md. 1972); *Hancock Bros., Inc.* v. *Jones,* 293 F. Supp. 1229 (N.D. Cal. 1968); *Cooney* v. *Sun Shipbuilding & Drydock Co.,* 288 F. Supp. 708 (E.D. Pa. 1968); *McFadden* v. *Avco Corp.,* 278 F. Supp. 57 (M.D. Ala. 1967); *O'Keefe* v. *Boeing Co.,* 38 F.R.D. 329 (S.D.N.Y. 1965); *Rosee* v. *Board of Trade,* 35 F.R.D. 512 (N.D. Cal. 1964); *Morris* v. *Atchison, Topeka & Sante Fe Ry. Co.,* 21 F.R.D. 155 (W.D. Mo. 1957); cf. *Garland* v. *Torre,* 259 F. 2d 545 (2d Cir. 1958) (Stewart, J.), cert. denied, 358 U.S. 910.

In some cases, it is true, the Executive Branch has been left free to decline to produce information if it is willing to suffer the loss of litigation in which it is a party. See, *e.g., Alderman* v. *United States,* 394 U.S. 165, 184; *Jencks* v. *United States,* 353 U.S. 657, 672; *Roviaro* v. *United States, supra,* 353 U.S. at 60–61; *cf. Reynolds* v. *United States, supra,* 345 U.S. at 12. But the existence of this remedial alternative in some cases does not support the proposition that the Executive rather than the courts has the final authority for determining whether, legally, a claim of privilege is well founded or not. Moreover, those decisions do not mark the limits of judicial power, for the underlying rationale in each was that the remedial "choice" fully protected the rights of the opposing party, the interests of the Executive and the integrity of the judicial process. In each case this Court recognized that the courts had the ultimate responsibility for passing upon the claim of privilege; only after the courts made the decisive determination could the government elect whether to sacrifice the case or produce the evidence found unprivileged.

In these "produce or dismiss" cases, the requirements of justice could be satisfied without compelling production of particular evidence sought by an adverse party, after judicial rejection of an executive claim of privilege, if the government preferred to accept the "remedy" of losing the case to which it was a party. See generally Rule 16(g), Federal Rules of Criminal Procedure; Rule 37(b), Federal Rules of Civil Procedure. Where dismissal is not an adequate

or proper remedy for the parties or is not consistent with judicial integrity, however, the "produce or dismiss" choice cannot be available to the Executive following a judicial ruling rejecting the claim of privilege. As the district court recognized in the present case, the subpoena *duces tecum* to the President here issued to a person who, "as a practical matter, is a third party" (App. 98A). The President has personal custody of evidence sought by the United States, through its attorney, for use in a proceeding in which the President is not a party. Clearly, a person who is not a party to the main lawsuit has no lawful "election" other than to comply with a judicial determination overruling his claim of a privilege to refuse to give material evidence. The cases have so held."[47]

Furthermore, there is no such election when the very object of the legal proceeding is to acquire the information. Thus, for example, in the Freedom of Information Act cases, it could not be seriously contended that the government had some option other than to disclose any information the court finally determines was unprivileged. Indeed, as we observed above, the Act itself specifically provides the sanction of contempt for such an attempt to flout the court's decision.

Most basically, the "produce or dismiss" option reflects a realistic accommodation of the requirements of substantive justice in litigation. But any reliance on an alleged Presidential option to cause dismissal of this criminal prosecution by standing on a claim of

[47] See cases cited in note 46, *supra.*

privilege, even if overruled by the courts, must be rejected out of hand as plainly insufficient to satisfy the needs of public justice. The seriousness of the charged offenses and the high offices held by those indicted brand that "solution" as impermissible. The President, himself subject to investigation with respect to the offenses charged in the indictment, is in no position to make the delicate judgment whether the greater public interest lies in producing the evidence and continuing the prosecution or abandoning the prosecution.

As we discussed above (pp. 27–39), under the regulations establishing the Watergate Special Prosecution Force as a quasi-independent office within the Department of Justice, the President has no authority directly—or through the Attorney General—to decide that the Watergate prosecution, *United States* v. *Mitchell, et al.,* should be abandoned. It would make a travesty out of the independent institution of the Special Prosecutor if the President could accomplish this objective by indirection—by claiming that the courts have no power to order the production of evidence in this criminal prosecution and insisting that the courts be content with posing the dilemma of "produce or dismiss."

Counsel for the President previously argued that "[i]n the exercise of his discretion to claim executive privilege the President is answerable to the Nation but not the courts." [46] This assertion merely highlights

[46] Brief in Opposition 4, *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon, supra.*

the salutary effect of requiring the Executive to make its choice *after* the courts have adjudicated the relevant rights and obligations. Public responsibility cannot be fixed, however, until the alternatives are defined. Only then can the people, as the ultimate rulers, know who controlled the course of events and who took what decisions. The President cannot have it both ways: he cannot suggest that he could abort this investigation rather than comply with an order overruling his claim of privilege and use that hypothetical course to prevent the Court from ruling on the validity of the privilege claim itself. Unless and until the President attempts to exercise whatever powers he might have under the Constitution as Chief Executive to intervene directly in the conduct of this prosecution by the Department of Justice, as represented by the Special Prosecutor, and to procure the Special Prosecutor's dismissal and the countermanding of his conduct of the case, the President must allow the Special Prosecutor and the courts to conduct the prosecution in accordance with the regular processes of the law and without regard to any *potential* executive power to frustrate the administration of justice.

II. THE PRESIDENT IS NOT IMMUNE FROM JUDICIAL ORDERS REQUIRING THE PRODUCTION OF MATERIAL EVIDENCE FOR A CRIMINAL TRIAL

There is nothing in the position of the President, despite his status as Chief Executive, that deprives the courts of their constitutional power to resolve this dispute. The power to decide this case simply cannot differ because the President elected to take personal

control of the subpoenaed evidence. The Framers of our Constitution, concerned as they were about the abuses of royal prerogative, were very careful to provide for a Presidency with defined and limited constitutional powers and not the prerogatives and immunities of a sovereign. Under our Constitution, the people are sovereign, and the President, though Chief Executive and Chief of State, remains subject to the law.[49] Indeed, it is the very essence of the Presidential Office that it is subject to the commands of the law, for the President's basic governmental function is that of Chief Executive—whose duty it is to "take Care that the Laws be faithfully executed." It follows inexorably that in our system *even the President* is under the law.

No one would deny that every other officer of the executive branch is subject to judicial process,[50] and there is little basis in logic, policy or constitutional history for concluding that a matter becomes walled off from judicial authority simply because the President has elected to become personally involved in it. More basically, however, a true regard for the constitutional separation of powers compels the conclusion that the President himself is appropriately subject to judicial orders. It is the function of the courts to determine rights and obligations of public officers within the context of a justiciable controversy, including those of the President, and it is his sworn duty to "execute" those decisions. See *Cooper* v. *Aaron*, 358 U.S. 1, 12. It must follow that the courts have the power in appropriate cases to order even the President to perform a legal duty.

[49] Alexander Hamilton explained the posture of the President in our constitutional system in *The Federalist* Number 69 (B. F. Wright ed. 1961):

"The President of the United States would be an officer elected by the people for *four* years; the king of Great Britain is a perpetual and *hereditary* prince. The one would be amenable to personal punishment and disgrace; the person of the other is sacred and inviolable." (Emphasis in original.)

[50] See, *e.g.*, *Panama Canal Co.* v. *Grace Lines, Inc.*, 356 U.S. 309, 317–18; *Wilbur* v. *United States ex rel. Kadrie*, 281 U.S. 206, 218–22; *Work* v. *United States ex rel. Rives*, 267 U.S. 175, 177–78; *Ballinger* v. *United States ex rel. Frost*, 216 U.S. 240, 249; *Garfield* v. *United States ex rel. Goldsby*, 211 U.S. 249, 262; *Roberts* v. *United States ex rel. Valentine*, 176 U.S. 221, 229–31; *United States ex rel. McBride* v. *Schurz*, 102 U.S. 378; *Kendall* v. *United States ex rel. Stokes*, *supra*, 12 Pet. at 609 *et seq.*; *Marbury* v. *Madison*, *supra*, 1 Cranch at 164–66.

A. THE POWER OF THE COURTS TO ISSUE SUBPOENAS TO THE PRESIDENT, LONG RECOGNIZED BY THE COURTS, FLOWS FROM THE FUNDAMENTAL PRINCIPLE THAT NO MAN IS ABOVE THE LAW

At the heart of the court's power to issue and enforce a subpoena *duces tecum* directed to the President of the United States lies the "longstanding principle 'that the public * * * has a right to every man's evidence.'" *Branzburg* v. *Hayes*, 408 U.S. 665, 688;[51]

[51] This Court in *Branzburg* quoted Jeremy Bentham's vivid illustration:

"Are men of the first rank and consideration—are men high in office—men whose time is not less valuable to the public than to themselves—are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary, they and everybody . . . Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach while a chimneysweeper and a barrowwoman were in dispute about a halfpennyworth of apples, and

cf. Watkins v. *United States,* 354 U.S. 178, 187. This power, which in the context of the Watergate investigation and prosecution has proved essential to the full and impartial administration of justice, was upheld in *Nixon* v. *Sirica, supra,* 487 F. 2d at 708–12, a decision with which President Nixon willingly complied, rather than seek review in this Court. As the court of appeals recognized, "incumbency does not relieve the President of the routine legal obligations that confine all citizens." 487 F. 2d at 711. "The clear implication [of the *Burr* case] is that the President's special interests may warrant a careful judicial screening of subpoenas after the President interposes an objection, but that some subpoenas will nevertheless be properly sustained by judicial orders of compliance." 487 F. 2d at 710.

The holding of the court in *Nixon* v. *Sirica* is hardly a newfound principle wrought from the exigencies of Watergate. The authority to issue a subpoena *duces tecum* to a sitting President was recognized as early as 1807 by Chief Justice Marshall in *United States* v. *Burr,* 25 Fed. Cas. 30 (No. 14,692d) (C.C.D. Va.).[32]

---

the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly."

See 4 The Works of Jeremy Bentham 320–21 (Bowring ed. 1843).

See also *United States* v. *Dionisio,* 410 U.S. 1, 9; *Blackmer* v. *United States,* 284 U.S. 421, 438; *Blair* v. *United States,* 250 U.S. 273, 280–281; 8 Wigmore, Evidence § 2192 (McNaughton rev. 1961) [hereinafter cited as "Wigmore"].

[32] For a complete exposition of the decisions in the *Burr* cases based upon the original record of the Burr trials, see Berger, *The President, Congress, and the Courts,* 83 Yale L.J. 1111–22 (1974).

This landmark decision was noted with approval by this Court in *Branzburg* v. *Hayes, supra,* 408 U.S. at 689 n.26. Although Chief Justice Marshall acknowledged that the power was one to be exercised with attention both to the convenience of the President in performing his arduous duties and to the possibility that the public interest might preclude coercing particular disclosures, he utterly rejected any suggestion that the President, like the King of England, is absolutely immune from judicial process (25 Fed. Cas. at 34):

> Although he [the King] may, perhaps, give testimony, it is said to be incompatible with his dignity to appear under the process of the court. Of the many points of difference which exist between the first magistrate in England and the first magistrate of the United States, in respect to the personal dignity conferred on them by the constitutions of their respective nations, the court will only select and mention two. It is a principle of the English constitution that the king can do no wrong, that no blame can be imputed to him, that he cannot be named in debate. By the constitution of the United States, the president, as well as any other officer of the government, may be impeached, and may be removed from office on high crimes and misdemeanors. By the constitution of Great Britain, the crown is hereditary, and the monarch can never be a subject. By that of the United States, the president is elected from the mass of the people, and, on the expiration of the time for which he is elected, returns to the mass of the people again. How essentially this difference of circumstances must vary the policy of the laws of the two

> countries, in reference to the personal dignity of the executive chief, will be perceived by every person. In this respect the first magistrate of the Union may more properly be likened to the first magistrate of a state; at any rate, under the former Confederation; and it is not known ever to have been doubted, but that the chief magistrate of a state might be served with a subpoena ad testificandum.

The decisions in the *Burr* case and *Nixon* v. *Sirica* are premised on the theory that every citizen, no matter what his station or office, has an enforceable legal duty not to withhold evidence the production of which the courts determine to be in the public interest. Stated more broadly, and in more familiar terms, they flow from the premise that this is a government of laws and not of men. This Court summed up this fundamental precept of our republican form of government nearly a century ago in *United States* v. *Lee*, 106 U.S. 196, 220:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

The Steel Seizure Case is perhaps the most celebrated instance where this Court has reviewed the assertion of Presidential power. *Youngstown Sheet & Tube Co.* v. *Sawyer, supra.* As we noted above, President Truman concluded that a work stoppage at the Nation's steel mills during the Korean War "would immediately jeopardize and imperil our national defense." In directing the Secretary of Commerce to seize certain of the mills, the President asserted that he "was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States." 343 U.S. at 582. District Judge Holtzoff denied a temporary restraining order on the ground that what was involved was the action of the President and that the courts could not enjoin Presidential action. Judge Pine, however, granted a preliminary injunction. This Court, deciding "whether *the President* was acting within his constitutional power" (343 U.S. at 582, emphasis added), upheld the preliminary injunction. In doing so, there was no doubt expressed that the Court could adjudicate the claim that the President had no constitutional power to issue the Executive Order. Nor, after reading the opinions of the Court, can there be any question that the Court would have granted relief against the President if he had directly ordered the seizure of the mills rather than acting through the Secretary of Commerce.[53] See, *e.g.*, 343 U.S. at 585.

---

[53] It is true that custom dictates that legal process should not be addressed to the President of the United States whenever a Cabinet member or lesser official is available, even though

The Executive's claim of total immunity from judicial decrees is not a new one. In *Land* v. *Dollar, supra,* the Court of Appeals for the District of Columbia Circuit held Secretary of Commerce Sawyer and Acting Attorney General Perlman and subordinate executive officials in civil contempt for failing to comply with a final order requiring them to deliver full and effective possession of certain stock to the prevailing litigant. They attempted to justify their conduct in part on the ground that they were following the directive of the President to Secretary

---

the subordinate official is acting upon direct order of the President. *E.g., Youngstown Sheet & Tube Co.* v. *Sawyer, supra,* 343 U.S. 579; *cf. United States Servicemen's Fund* v. *Eastland,* 488 F. 2d 1252, 1270 (D.C. Cir. 1973). It became necessary to seek this evidence from the President only because he elected, by deliberate and affirmative actions, to displace the ordinary custodians of the materials and to assume personal control of them. To allow this device to render the tapes immune from ordinary legal process would exalt form over substance and set a President above the law, contrary to our firm constitutional tradition. As the court of appeals stated in *Nixon* v. *Sirica, supra,* 487 F. 2d at 709, "[t]he practice of judicial review would be rendered capricious—and very likely impotent—if jurisdiction vanished whenever the President personally denoted an Executive action or omission as his own." See also *National Treasury Employees Union* v. *Nixon, supra,* 492 F. 2d at 613.

In addition to the courts below in the present case and in *Nixon* v. *Sirica,* other courts have recognized that compulsory process may issue against the President, when necessary. See *Minnesota Chippewa Tribe* v. *Carlucci,* 358 F. Supp. 973, 975 (D.D.C. 1973) (holding that the President can be sued to compel performance of specific legal duties) (order vacated on grounds of mootness); *Meyers* v. *Nixon,* 339 F. Supp. 1388 (S.D.N.Y. 1972); *Atlee* v. *Nixon,* 336 F. Supp. 790 (E.D. Pa. 1972).

Sawyer "to continue to hold this stock on behalf of the United States" and they further asserted "that, even though the courts determine that a specific action is not within the official capacity of an executive officer, he is immune from compulsion by the courts in respect to that action." 190 F. 2d at 639. The court of appeals rejected the argument in the most emphatic terms (*ibid.*):

> To claim that the executive has such power [to hold the shares despite the decree] is to claim the total independence of the executive from judicial determinations in justiciable cases and controversies. To characterize such judicial determinations as illegal coercion of the executive is to deny one of the fundamental concepts of our government.

Although there have been a few notorious instances in our history in which Presidents have refused to give appropriate force to judicial decrees, or are reputed to have made disdainful statements about the decisions, none involved direct disobedience of a court order. More importantly, it is the judgment of history that those were essentially lawless departures from the constitutional norm.[54] The responsible constitutional

---

[54] See, *e.g.*, R. Scigliano, *The Supreme Court and the Presidency* 36–37 (1971) and C. Warren, *The Supreme Court in United States History* 759 (rev. ed. 1926) (President Andrew Jackson's failure to take steps to vindicate the Court's decision in the Cherokee Nation case, *Worcester* v. *Georgia,* 6 Pet. (31 U.S.) 515); Scigliano, *supra,* at 37–38 (Jackson's vetoing of the national bank bill on constitutional grounds, despite an earlier decision by this Court tending to sustain its validity); Scigliano, *supra,* at 41–45 (President Lincoln's ignoring of several writs of habeas corpus addressed to military commanders during the Civil War). See generally Scigliano, *supra,* 58–59.

position was expressed by President Truman—a defender of a strong Executive—in announcing that he would comply with an order of this Court in the Steel Seizure Case if it went against him, despite his claim of constitutional power to order the seizure. The President's position was stated through Senator Hubert Humphrey, who quoted the President as saying he would "rest his case with the courts of the land." The President was further quoted as saying:

> I am a constitutional President and my whole record and public life has been one of defense and support of the Constitution.

New York Times, April 29, 1952, p. 1, col. 3. A report of a later press conference with President Truman on this issue stated:

> Asked whether he had been quoted correctly in saying that he would accept the Supreme Court's decision on seizure, the President said certainly—he had no ambition to be a dictator.

New York Times, May 2, 1952, p. 1, col. 5. Of course, when this Court later rejected the constitutional bases for President Truman's action, he complied with the decision, in deference to the principle that even in the gravest matters, the President is under the law.

B. THERE IS NO BASIS EITHER IN THE CONSTITUTION OR IN THE INTENT OF THE FRAMERS FOR CONFERRING ABSOLUTE IMMUNITY ON THE PRESIDENT

The decisions in the *Burr* case and *Nixon* v. *Sirica* are in accord with settled decisions of this Court and others. They establish principles that faithfully reflect what historical evidence shows was the intent of the

Framers. Contrasted with the explicit privileges in Article I for Congress, no comparable privileges or immunities were specified for the President or Executive Branch in Article II, even though they had been commonplace for the King. The Founding Fathers were keenly aware of the dangers of executive power. Even James Wilson, who favored a strong Executive,[55] rejected "the Prerogatives of the British Monarch as a proper guide in defining the Executive powers."[56] He stated at the Pennsylvania Ratification Convention:

> The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence or inattention; he cannot roll upon any other person the weight of his criminality * * *. Add to all this, that officer is placed high, and is possessed of power far from being contemptible; yet not a *single privilege* is annexed to his character * * *.[57]

One might infer quite plausibly from the specific grant of official privileges to Congress that no other constitutional immunity from normal legal obligations was intended for government officials or papers. Indeed, Charles Pinckney stated in the Senate on

---

[55] See E. Corwin, *The President: Office and Powers* 11 (1948).

[56] 1 Farrand, Records of the Federal Convention of 1787, at 65–66 (1911) (hereinafter "Farrand"). See also 4 Elliot's Debates 108–09 (2d ed. 1836) (remarks of Iredell at the North Carolina Ratification Convention).

[57] 2 Elliot's Debates 480 (2d ed. 1836).

March 5, 1800, speaking of the express congressional privilege from arrest:

> They [the Framers] well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here. * * *
>
> * * * * *
>
> No privilege of this kind was intended for your Executive, nor any except that which I have mentioned for your Legislature.[58]

The teaching of history is thus persuasive against the claim of an absolute Presidential prerogative to be immune from the judicial process. The Court of Appeals for the District of Columbia Circuit recognized this in rejecting President Nixon's claim of absolute immunity from a grand jury subpoena *duces tecum* (*Nixon* v. *Sirica, supra,* 487 F. 2d at 711):

> The Constitution makes no mention of special presidential immunities. Indeed, the Executive Branch generally is afforded none. * * * Lacking textual support, counsel for the President nonetheless would have us infer immunity from the President's political mandate, or from his vulnerability to impeachment, or from his broad discretionary powers. These are invitations to refashion the Constitution, and we reject them.

[58] 3 Farrand at 384–385.

The Founding Fathers were conscious of the "aversion of the people to monarchy." *The Federalist* Number 67 (B. F. Wright ed. 1961). Corwin has explained "that 'the executive magistracy' was the natural enemy, the legislative assembly the natural friend of liberty." E. Corwin, *The President: Office and Powers* 4 (1948).

Similarly, a special panel composed of Senior Circuit Judges Johnsen, Lumbard and Breitenstein, speaking for the Seventh Circuit in connection with the prosecution of Circuit Judge Otto Kerner, recently rejected his argument, similar to the one made by counsel for the President, that the constitutional provision for impeachment (Art. I, Sec. 3, cl. 7) implicitly confers immunity on civil officers from the criminal process prior to impeachment and removal from office, *United States* v. *Isaacs and Kerner,* 493 F. 2d 1124 (7th Cir. 1974), cert. denied, —— U.S. —— (June 17, 1974). The court concluded (493 F. 2d at 1144):

> [W]hatever immunities or privileges the Constitution confers for the purpose of assuring the independence of the co-equal branches of government they do not exempt the members of those branches "from the operation of the ordinary criminal laws." Criminal conduct is not part of the necessary functions performed by public officials. Punishment for that conduct will not interfere with the legitimate operations of a branch of government.

The fact that the President is the *head* of the Executive Branch does not render these principles inapplicable here.[59] "We have no officers in this government from the President down to the most subordinate agent, who does not hold office under the law, with

[59] We are not dealing in this case, of course, with the question whether, even in the absence of any explicit immunity, an incumbent President is entitled to implicit immunity from having to defend himself against criminal charges lodged against him in an indictment.

prescribed duties and limited authority." *The Floyd Acceptances*, 7 Wall. (74 U.S.) 666, 676–77.

C. THE COURTS CAN ISSUE PROCESS TO THE PRESIDENT WHERE, AS HERE, IT DOES NOT INTERFERE WITH HIS EXERCISE OF DISCRETIONARY POWER BUT MERELY REQUIRES MINISTERIAL COMPLIANCE WITH A LEGAL DUTY

The argument that the President is immune from process is sometimes rested upon a misreading of *Mississippi* v. *Johnson*, 4 Wall. (71 U.S.) 475.[60] In that case the State of Mississippi sought leave to file an original bill to enjoin President Johnson from enforcing the Reconstruction Acts, which provided for reconstitution of the governments of the erstwhile Confederacy. Because the President was named as a defendant in the bill, this Court heard argument upon the question of jurisdiction before the bill was filed, instead of reserving the question to a later stage.[61] Attorney General Stanbery argued to the Court that the President is "above the process of any court," asserting that "[h]e represents the majesty of the law and of the people as fully and as essentially, and with the same dignity, as does any absolute monarch or the head of any independent government in the world." 4 Wall. at 484.

[60] Scattered district court opinions seem to have accepted that argument, at least where discretionary executive powers were at issue. See, *e.g.*, *National Ass'n of Internal Revenue Employees* v. *Nixon*, 349 F. Supp. 18, 21 (D.D.C. 1972), rev'd, 492 F. 2d 587 (D.C. Cir. 1974); *Reese* v. *Nixon*, 347 F. Supp. 314, 316–17 (C.D. Cal. 1972).

[61] Fairman, *Reconstruction and Reunion 1864–88*, 6 History of the Supreme Court of the United States 379–80, 436–37 (1971).

Faithful to the tradition that in the United States no man and no office are above the law, this Court refused to accept the Attorney General's claim of royal immunity for the President of the United States (4 Wall at 498). Rather, it held that it had "no jurisdiction of a bill to enjoin the President in the performance of his official duties" (4 Wall. at 501), distinguishing the power of the courts to require the President to perform a simple ministerial act from an attempt to control the exercise of his broad constitutional discretion (4 Wall. at 499):

> In each of these cases [involving ministerial duties] nothing was left to discretion. There was no room for the exercise of judgment. The law required the performance of a single specific act; and that performance, it was held, might be required by mandamus.
>
> Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. * * * The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political.

Mississippi v. *Johnson* arose shortly after the Civil War, when there was a bitter political conflict over the proper national policy to be followed in dealing with the secessionist States. In declining to exercise its original jurisdiction over an equitable suit brought by a State seeking to enjoin the President from enforcing congressional policy, the Court had no occasion to decide that *no* federal court could ever issue *any* order to the President, and the Court was careful

to leave open the question of the President's amenability to the judicial process where only a clear legal duty, rather than the exercise of discretionary political judgment, is involved, as in the present case.

Shortly after the decision in *Mississippi* v. *Johnson,* the Court also declined jurisdiction of similar bills naming the Secretary of War or a military commander as respondent. *Georgia* v. *Stanton,* 6 Wall. (73 U.S.) 50. Their disposition is further proof that it was the character of the question presented and not the identity of the respondent that determined the issue in *Mississippi* v. *Johnson.* In the words of Chief Justice Marshall, "[i]t is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined." *Marbury* v. *Madison, supra,* 1 Cranch at 170.

Later cases have confirmed that *Mississippi* v. *Johnson* did not turn on the fact that the respondent was the President, but was an early expression of the nonjusticiability of "political questions."[62] This Court has cited the decision as an example of instances where the Court has refused "to entertain * * * original actions * * * that seek to embroil this tribunal in 'political questions.'" *Ohio* v. *Wyandotte Chemicals Corp.,* 401 U.S. 493, 496.

[62] See also *Colegrove* v. *Green,* 328 U.S. 549, 556; *Louisiana* v. *McAdoo,* 234 U.S. 627, 633–34; *Wisconsin* v. *Pelican Insurance Co.,* 127 U.S. 265, 296; *National Treasury Employees Union* v. *Nixon, supra,* 492 F. 2d at 613–15.

The crucial jurisdictional issue, then, is not the identity of the executive officer or the physical power to secure compliance with judicial orders,[63] but the Court's ability to resolve authoritatively the conflicting claims of legal rights and obligations. See *Baker* v. *Carr, supra,* 369 U.S. at 208–237. The Judiciary, of course, must be circumspect in issuing process against the President to avoid interference with the proper discharge of his executive functions. For example, it might not be proper, in the absence of strong necessity, to require the President to appear personally before a court if that appearance would interfere with his schedule or the performance of his duties. Similarly, the courts should not saddle the Chief Executive with requests that are administratively burdensome. Compare *United States* v. *Burr,* 25 Fed. Cas. 30, 34 (No. 14,692d) (C.C.D. Va. 1807). The court's discretionary power to control its own process and grant protective orders provides adequate safeguard against undue imposition on the President's time. Beyond that, there may be some Presidential acts that are beyond the court's ken entirely, such as his exercise of discretionary constitutional powers that implicate "political questions." See *Mississippi* v. *Johnson, supra,* 4 Wall. at 499–501; *Marbury* v. *Madison, supra,* 1 Cranch at 165–66, 170. See also *National Treasury Employees Union* v. *Nixon,* 492 F. 2d 587, 606 (D.C. Cir. 1974).

But the question here is very different. The Court is called upon to adjudicate the obligation of the Presi-

[63] See pp. 44–47, *supra.*

dent, as a citizen of the United States, to cooperate with a criminal prosecution by performing the solely ministerial task of producing specified recordings and documentary evidence. This Court has defined "ministerial duty" as "one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law." *Mississippi* v. *Johnson, supra,* 4 Wall. at 498. Judge Fahy, noting that "the word 'ministerial' is not sufficiently expressive to denote adequately every situation into which the courts may enter," added, however, that "a duty often becomes ministerial only after a court has reached its own judgment about a disputable legal question and its application to a factual situation." *Seaton* v. *Texas Co.,* 256 F. 2d 718, 723 (D.C. Cir. 1958). As we have shown above, the courts, and not the Executive, must decide the existence *vel non* of a privilege for evidence material to a criminal prosecution. A decision overruling the claim will be as fully binding on the President as it would be upon a subordinate executive officer who had custody or control of the subpoenaed evidence.[64]

III. THE CONVERSATIONS DESCRIBED IN THE SUBPOENA RELATING TO WATERGATE LIE OUTSIDE THE EXECUTIVE PRIVILEGE FOR CONFIDENTIAL COMMUNICATIONS

The President, in his Formal Claim of Privilege submitted to the court below, asserted that the items

[64] The subpoena *duces tecum* is directed to "Richard M. Nixon *or* any subordinate officer" whom he may designate as having custody of the tape recordings and other documents.

in the subpoena, other than the portions of twenty conversations already made public:

> are confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce. Thus I must respectfully claim privilege with regard to them to the extent that they may have been recorded, or that there may be memoranda, papers, transcripts, or other writings relating to them.

The President was relying, of course, on "the long-standing judicial recognition of Executive privilege * * * [for] 'intra-governmental documents reflecting * * * deliberations comprising part of a process by which governmental decisions and policies are formulated.' "[65] *Nixon* v. *Sirica, supra,* 487 F. 2d at 713.

The President made a similar claim in response to the grand jury's subpoena *duces tecum* at issue in the

[65] We use the term "generalized claim of executive privilege" to cover a claim of privilege based on an asserted interest in the confidentiality of communications within the Executive Branch, as distinguished from more specific privileges sometimes covered by the term "executive privilege."

Thus, the courts have recognized a specific privilege for "state secrets," covering government information bearing on international relations, military affairs and the national security. See, *e.g., United States* v. *Reynolds, supra,* 345 U.S. at 6–7; *United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. 304, 320–21; 8 Wigmore § 2378. There is also a privilege for "investigative files," including information relating to confidential informants. See, *e.g., Alderman* v. *United States,* 394 U.S. 165, 184–85; *Roviaro* v. *United States,* 353 U.S. 53; *Machin* v. *Zuckert, supra,* 316 F. 2d at 339; 8 Wigmore §§ 2374–77; cf. *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462.

The President has not claimed any such specific type of "executive privilege" for any of the conversations described in the subpoena.

earlier litigation involved in *Nixon* v. *Sirica*.[66] His counsel argued to the court that the "threat of potential disclosure of any and all conversations would make it virtually impossible for President Nixon or his successors in that great office to function."[67] Counsel argued further that the President's absolute prerogative to withhold information "reaches any information that the President determines cannot be disclosed consistent with the public interest and the proper performance of his constitutional duties."[68] Within the contours of the instant case, counsel for the President in effect poses the following question for the Court: Shall guilt or innocence in the criminal trials of former White House aides be determined upon full consideration of all the evidence found relevant, competent and unprivileged by due process of law? Or shall the evidence from the White House be confined to what a single person, highly interested in the outcome, is willing to make available?

By urging upon the courts the absolute, unreviewable discretion of the President to withhold evidence from the trial in *United States* v. *Mitchell, et al.*,

[66] In a letter to Chief Judge Sirica on July 25, 1973, the return date of that subpoena, President Nixon stated:

> I have concluded, however, that it would be inconsistent with the public interest and with the Constitutional position of the Presidency to make available recordings of meetings and telephone conversations in which I was a participant and I must respectfully decline to do so.

Special Appearance of Richard M. Nixon, Exh. A, *In Re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon*, *supra*.

[67] Brief in Opposition 2–3, *id.*

[68] Brief in Opposition 12–13, *id.*

counsel for the President seemingly ignores the principle, articulated by Justice Reed, that executive privilege is granted "for the benefit of the public." *Kaiser Aluminum & Chemical Corp.* v. *United States*, *supra*, 157 F. Supp. at 944. Ultimately, the public interest must govern whether or not particular items are disclosed. When the participants in Presidential conversations are themselves subject to indictment and the subject matter of the conversations is material to the issues to be tried upon the indictment, denying the courts access to recordings of the conversations impedes the due administration of justice.

Moreover, production of the evidence sought, even upon order of the court, does not threaten wholesale disclosure of Presidential documents either now or in the future. It bears repeating that this is a case in which the other participants in the conversations are subject to indictment. The conversations covered by the present subpoena are demonstrably important—as the trial court below found—to defining the extent of the conspiracy in terms of time, membership, and objectives. Surely there will be few instances, if ever, where there are similar concrete circumstances warranting intrusion into an otherwise privileged domain of conversations involving the President and his aides. Thus, any slight risk that future conversations may be disclosable under such a standard hardly will intimidate Presidential aides in giving open and candid advice. Furthermore, the desirable public policy of encouraging frank advice to governmental officials does not and cannot depend on any expecta-

tion of absolute confidentiality. It is almost commonplace in our system for former officials, including Presidents, promptly to publish their memoirs, frequently based on documents reflecting governmental deliberations.[69] This is a generally understood phenomenon, and it is unthinkable that the court's entitlement to important evidence must be relegated to a lower priority.

Under these circumstances, the district court properly rejected the claim of privilege (Pet. App. 20), holding that the "Special Prosecutor's submissions * * * constitute a *prima facie* showing adequate to rebut the presumption [of privilege] in each instance, and a demonstration of need sufficiently compelling to warrant judicial examination in chambers incident to weighing claims of privilege where the privilege has not been relinquished." The court followed the "settled rule" that "the court must balance the moving party's need for the documents in the litigation against the reasons which are asserted in defending their confidentiality." *Committee for Nuclear Responsibility, Inc.* v. *Seaborg, supra,* 463 F. 2d at 791. See also *United States* v. *Reynolds, supra,* 345 U.S. at 11; *Nixon* v. *Sirica, supra,* 487 F. 2d at 716; cf. *Doe* v. *McMillan, supra,* 412 U.S. at 320.

[69] For example, Executive Order 11,652, "Classification and Declassification of National Security Information and Material," issued by President Nixon on March 8, 1972, provides for access to classified data by persons "who have previously occupied policymaking positions to which they were appointed by the President" (Sec. 12), although publication of the material is not authorized.

Although the court below followed the "settled rule" of balancing particular need against the specific interest in confidentiality, that rule becomes applicable only where the "presumptive privilege" for the materials has not been vitiated by other factors. In the present case, there are two additional grounds for overruling the asserted privilege, each of which shows that the subpoenaed material has lost its character as "presumptively privileged." First, the interest in confidentiality is never sufficient to support an official privilege where, as here, there is a *prima facie* showing that the subpoenaed materials cover conversations and activities in furtherance of a criminal conspiracy; thus, Watergate-related conversations are not even covered by the presumptive privilege recognized in *Nixon* v. *Sirica, supra,* 487 F. 2d at 717. Second, as we show in Part IV below, to the extent that the subpoenaed conversations relating to Watergate are deemed covered by some presumptive executive privilege, any claim to continued secrecy has been waived as a matter of law by the extensive testimony and public statements of participants, given with the President's consent, concerning these conversations and by the President's recent release of transcripts of forty-three Presidential conversations dealing with these issues.

Before turning to the discussion of the independent grounds for overruling the President's claim of privilege, we briefly mention two basic principles that should guide this Court's determination. First, whether particular documents or other materials are

privileged in the context of a criminal prosecution is *for judicial determination*—upon the extrinsic evidence if sufficient, but otherwise upon *in camera* inspection (see Part I(A), *supra*). Second, in making this determination, the Court must construe the privilege strictly. Evidentiary privileges generally are "an obstacle to the administration of justice" (8 Wigmore § 2192, at 73), and, as "so many derogations from [the] positive general rule" that the public has a right to every man's evidence (*id.*, at 70), they must be confined to the narrowest limits justified by their underlying policies.[70] "To hold otherwise would be to invite gratuitous injury to citizens for little if any public purpose." *Doe* v. *McMillan, supra,* 412 U.S. at 316–17. Such strictness in application of executive privilege conforms to the ideas of the Founding Fathers, who were keenly aware of the dangers of Executive secrecy."[71]

A. EXECUTIVE PRIVILEGE BASED UPON A NEED FOR CANDOR IN GOVERNMENTAL DELIBERATIONS DOES NOT APPLY WHERE THERE IS A PRIMA FACIE SHOWING THAT THE DISCUSSIONS WERE IN FURTHERANCE OF A CONTINUING CRIMINAL CONSPIRACY

As stated above, the only privilege relied upon by the President stems from his assertion that the "items sought are confidential conversations between a President and his close advisors." We freely concede that a qualified or "presumptive" privilege normally attaches to "intra-governmental documents reflecting

[70] See 8 Wigmore § 2192, at 73; Morgan, Foreword to ALI Model Code of Evidence 7 (1942).

[71] For a discussion of the intent of the Framers, see pp. 76–80, *supra.*

advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd on opinion below, 384 F. 2d 979 (D.C. Cir. 1967), cert. denied, 389 U.S. 952. But there can be no valid public policy affording the protection of executive privilege where there is a *prima facie* showing that the officials participating in the deliberations did so as part of a continuing criminal plan. In this case, where the grand jury has voted the Special Prosecutor the authority to identify the President himself as an unindicted co-conspirator in the events charged in the indictment and covered by the government's subpoena, there is such a *prima facie* showing and the President is foreclosed from invoking a privilege that exists only to protect and promote the legitimate conduct of the Nation's affairs.

The qualified privilege for governmental deliberations is based on "two important policy considerations * * *: encouraging full and candid intra-agency discussion, and shielding from disclosure the mental processes of executive and administrative officers."[72] *International Paper Co.* v. *Federal Power Commission,* 438 F. 2d 1349, 1358–59 (2d Cir. 1971), cert. denied, 404 U.S. 827. The privilege, however, whether in the context of intra-agency communications or in

[72] Only the interest in confidentiality as an encouragement to candor is involved in the present case, for there is plainly no challenge to the rationale for any governmental decision or order.

the context of deliberations at the highest level of the Executive Branch, exists only to promote the legitimate functioning of government. It cannot serve as a cloak to protect those charged with criminal wrong-doing. Executive privilege is granted "for the benefit of the public, not of executives who may happen to then hold office." *Kaiser Aluminum & Chemical Corp.* v. *United States, supra,* 157 F. Supp. at 944.

This is a familiar principle in the law of evidentiary privileges generally. For example, a client may not hide behind the attorney-client privilege and prevent his attorney from being required to disclose plans of continuing criminal activity even though told to him in confidence. See, *e.g., United States* v. *Aldridge,* 484 F. 2d 655 (7th Cir. 1973); *United States* v. *Rosenstein,* 474 F. 2d 705 (2d Cir. 1973); *United States* v. *Shewfelt,* 455 F. 2d 836 (9th Cir. 1972), cert. denied, 406 U.S. 944; *United States* v. *Bartlett,* 449 F. 2d 700 (8th Cir. 1971), cert. denied, 405 U.S. 932; *Garner* v. *Wolfinbarger,* 430 F. 2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974. Similarly, the courts have refused to recognize any privilege not to disclose communications by a patient which were not for the legitimate purpose of enabling the physician to prescribe treatment. See 8 Wigmore § 2383; McCormick, *Evidence* § 100 (2d ed. 1972). Even the privilege against disclosing marital communications or jury deliberations has been overruled when such communications were in furtherance of fraud or crime. See, *e.g., United States* v. *Kahn,* 471 F. 2d 191 (7th Cir. 1972),

cert. denied, 411 U.S. 986. See generally Note, *Future Crime or Tort Exception to Communications Privileges,* 77 Harv. L. Rev. 730 (1964).

The Speech or Debate Clause provides a compelling illustration of this principle. That clause confers an explicit constitutional privilege on members of Congress in order to promote candid and vigorous deliberations in the Legislative Branch.[73] Like executive privilege, which is based upon the same underlying policies and interests, "[t]he immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process." *United States* v. *Brewster, supra,* 408 U.S. at 507. The purpose of the Clause was to "assure a co-equal branch of the government wide freedom of speech, debate and deliberation without intimidation or threats from the Executive Branch." *Gravel* v. *United States, supra,* 408 U.S. at 616. But even though the Clause protects a legislator in the performance of legislative acts, "it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts." *Gravel* v. *United States, supra,* 408 U.S. at 626. See also *Tenney* v. *Brandhove,*

[73] The Speech or Debate Clause, Art. I, Sec. 6, cl. 1, provides that no Senator or Representative may be "questioned in any other Place" for "any Speech or Debate in either House." It prohibits inquiry "into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts." *United States* v. *Brewster, supra,* 408 U.S. at 512.

341 U.S. 367, 376 (legislative immunity is restricted to "the sphere of legitimate legislative activity"). Thus, both the legislator and his aide may be compelled to give evidence in that situation, notwithstanding the explicit privilege. See also *Doe* v. *McMillan, supra.*

Similarly, discussions within the Executive Branch which are in furtherance of a criminal conspiracy cannot be subsumed within executive privilege. The privilege, which is limited by its underlying public purpose, see, *e.g., Halpern* v. *United States, supra,* 258 F. 2d at 44, does not extend beyond the transaction of legitimate official activities so as to protect conversations that constitute evidence of official misconduct or crime. In *Rosee* v. *Board of Trade,* 36 F.R.D. 684, 690 (N.D. Ill. 1965), for example, the court overruled a claim of executive privilege invoked in the face of a substantiated charge of official misconduct where the party seeking the evidence showed "(1) that there is a reasonable basis for his request and (2) that the defendant government agents played some part in the operative events."[14] When the governmental processes which are fostered and protected by a privilege of confidentiality are abused or subverted, the reasons for secrecy no longer exist and the privilege is lifted.

[14] See also *Black* v. *Sheraton Corp.*, 371 F. Supp. 97 (D.D.C. 1974); *United States* v. *Procter & Gamble Co.*, 25 F.R.D. 485, 490–91 (D.N.J. 1960); *cf. Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena, supra,* 40 F.R.D. at 329 (footnotes omitted): "Here, unlike the situation in some cases, no charge of governmental misconduct or perversion of governmental power is advanced."

Executive privilege compares in this respect to executive immunity. A government official, of course, may not be held liable for damages in a civil action for the consequences of acts within the scope of his official duties. *Barr* v. *Matteo,* 360 U.S. 564. This immunity, like privilege, has been considered necessary to foster "the fearless, vigorous, and effective administration of policies of government." 360 U.S. at 571. But the immunity does not shield him for acts "manifestly or palpably beyond his authority." *Spalding* v. *Vilas,* 161 U.S. 483, 498. See also *Doe* v. *McMillan, supra; Bivens* v. *Six Unknown Federal Bureau of Narcotics Agents,* 456 F. 2d 1339 (2d Cir. 1972). And, as in the present case, the policy underlying executive immunity does not permit it to reach "so far as to immunize criminal conduct. * * *" *O'Shea* v. *Littleton, supra,* —— U.S. at —— (42 U.S.L.W. at 4144).

The Court of Appeals for the District of Columbia Circuit vividly highlighted the essence of this principle when it explained why the courts must not feel bound by the assertion of executive privilege but must instead scrutinize the propriety of the claim. "Otherwise," the court said, "the head of any executive department would have the power on his own say so to cover up all evidence of fraud and corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law." *Committee for Nuclear Responsibility, Inc.* v. *Seaborg, supra,* 463 F. 2d at 794.

Justice Cardozo gave an eloquent statement of why this is not the law in *Clark* v. *United States,* 289 U.S.

1, an analogous case dealing with the secrecy normally attaching to a jury's deliberations. Speaking for a unanimous Court, he recognized that the privilege, based upon a need for confidentiality, is generally valid: "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." 289 U.S. at 13. But Justice Cardozo also held that such a privilege, like other privileges based on the desirability of encouragng candid discourse and interplay, is subject to "conditions and exceptions" when there are other policies "competing for supremacy. It is then the function of the court to mediate between them." *Ibid.* The Court then held that where there is a "showing of a *prima facie* case" (289 U.S. at 14) that the relation has been tainted by criminal misconduct, the interest in confidentiality must yield. The Court held that the jury's privilege of confidentiality is dissipated if there is "evidence, direct or circumstantial, that money has been paid to a juror in consideration of his vote" (289 U.S. at 14). Justice Cardozo reasoned (*ibid.*):

> The privilege takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation, honestly created and honestly manjuror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth.

The Court then drew an analogy to the attorney-client privilege, one of the most venerable privileges in the

law, and emphasized: "The privilege takes flight if the relation is abused." 289 U.S. at 215.[15]

1. The grand jury's finding is valid and is sufficient to show prima facie that the President was a co-conspirator

The present case is governed by these principles, as articulated in cases like *Clark*. On February 25, 1974, in the course of its consideration of the indictment in *United States* v. *Mitchell, et al.*, the grand jury, by a vote of 19-0, determined that there is probable cause to believe that Richard M. Nixon (among others) was a member of the conspiracy to defraud the United States and to obstruct justice charged in Count I of the indictment. The grand jury authorized the Special Prosecutor to identify Richard M. Nixon (among others) as an unindicted co-conspirator in connection with subsequent proceedings in *United States* v. *Mitchell, et al.* The district court below, denying the President's motion to expunge the grand jury's finding, ruled that this finding is relevant "to a determination that the presumption of privilege is overcome" (Pet. App. 23).

[15] Recently the Court of Appeals for the Seventh Circuit held that the attorney-client privilege must yield upon a "*prima facie*" showing that the communications were made in furtherance of a continuing or future fraud or crime. *United States* v. *Aldridge*, *supra*, 484 F. 2d at 658. Other circuits agree that a *prima facie* showing that some fraud or criminal misconduct may have tainted what would otherwise have been a privileged, confidential relationship is sufficient to require that the privilege yield. See, *e.g.*, *Pfizer, Inc.* v. *Lord*, 456 F. 2d 545 (8th Cir. 1972); *United States* v. *Friedman*, 445 F. 2d 1076 (9th Cir. 1971), cert. denied, 404 U.S. 958; *United States* v. *Bob*, 106 F. 2d 37 (2d Cir. 1939), cert. denied, 308 U.S. 589. See also *O'Rourke* v. *Darbishire*, [1920] A.C. 581 (H.L.), establishing the same standard.

The grand jury's authorization to the Special Prosecutor constitutes the requisite *prima facie* showing to negate any claim of executive privilege for the subpoenaed conversations relating to Watergate and is binding on the courts at this stage of the proceedings in *United States* v. *Mitchell, et al.* As this Court held in *Ex Parte United States,* 287 U.S. 241, 250, the vote of a "properly constituted grand jury conclusively determines the existence of probable cause * * *."[76] Despite the President's contention in No. 73–1834, therefore, the district court properly refused to expunge this finding.[77]

[76] Accord, *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, 599; *United States* v. *King*, 482 F. 2d 768, 776 (D.C. Cir. 1973); *United States* v. *Kysar*, 459 F. 2d 422, 424 (10th Cir. 1972). The grand jury's finding cannot be challenged on the ground that it was based upon inadequate evidence. See, *e.g.*, *United States* v. *Calandra*, —— U.S. ——, —— (42 U.S.L.W. 4104, 4106, Jan. 8, 1974); *Costello* v. *United States*, 350 U.S. 359, 363 (1956).

The above decisions, of course, concern findings of probable cause which appear on the face of the indictment. The June 5, 1972 grand jury could likewise have listed every known co-conspirator in the indictment, in which case that finding of complicity in the conspiracy would have been conclusive in these pre-trial proceedings. Out of deference to the President's public position, however, the grand jury instead decided to vote *in camera* upon a finding of probable cause against each alleged co-conspirator, but not to name any formally in the indictment. The grand jury further authorized the Special Prosecutor to disclose and rely upon its determination of probable cause if and when such action became necessary. There is no reason why the same conclusive effect should not be given to the grand jury's determination in this case as would have been accorded if the grand jury had been less solicitous of the President's position.

[77] There is no reason to believe that the grand jury's finding is unconstitutional or in any sense an abuse of the grand jury's power. In the district court, the President premised the motion

(Continued)

Each of the principal participants in the subpoenaed conversations has been identified by the grand jury as a co-conspirator, and, as demonstrated by the showing in the Appendix submitted to the dis-

(Continued)

to expunge on the contention that the President is not subject to indictment prior to removal from office. The Constitution, however, contains no explicit Presidential immunity from the ordinary process of the criminal law prior to impeachment and removal, and there are substantial arguments that an implict imunity is likewise not warranted by the Constitution. See Berger, "The President, Congress, and the Courts," 83 Yale L.J. 1111, 1123–36 (1974); Rawle, *A View of the Constitution of the United States of America* 215 (2d ed. 1829). See also, *United States* v. *Isaacs and Kerner*, *supra*, holding that an impeachable officer is liable to criminal prosecution prior to impeachment and removal.

Here, however, the grand jury did not indict the President, but only named him as an unindicted co-conspirator. Therefore, the broader question of whether an indictment of a sitting President is constitutionally permissible need not be reached. None of the practical difficulties incident to indicting an incumbent President and requiring him to defend himself while still conducting the affairs of state exists when the grand jury merely names the President as an unindicted co-conspirator. This action does not constitute substantial interference with the President's ability to perform his official functions. For example, an unindicted co-conspirator need not spend time and effort in preparing his defense, time which a President may need to devote to carrying out his constitutional duties. Nor is there any inherent unfairness in such a course since an incumbent President has at his command all of the Nation's communications facilities to convey his position on the events in question. Thus, whatever may be the case with respect to indictment, there are no substantial arguments for creating an immunity for the President even from being identified as a co-conspirator when a grand jury finds it necessary and appropriate to do so in connection with an independent criminal prosecution of others.

Furthermore, even assuming *arguendo* that the grand jury's action was without legal effect, the district judge had ample discretion to refuse to expunge its finding. See *In re Grand Jury Proceedings*, 479 F. 2d 458, 460 n. 2 (5th Cir. 1973) and

(Continued)

trict court below in opposition to the President's motion to quash, it is probable that each of the subpoenaed conversations includes discussions in furtherance of the conspiracy charged in the indictment. Thus, there is no room to argue that the subpoenaed conversations are subject to a privilege that exists to protect the public's legitimate interests in effective representative government. The grand jury has returned an indictment charging criminal conduct by high officials in the Executive Branch, and the public interest requires no less than a trial based upon *all* relevant and material evidence relating to the charges.

In opposing the grand jury's subpoena *duces tecum,* counsel for the President argued that despite any showing that statements in the course of Presidential conversations were made in furtherance of a conspiracy to obstruct justice, the general principle of confidentiality must be maintained in order to assure the effective functioning of the Presidential staff sys-

(Continued)
Application of Johnson, 484 F. 2d 791 (7th Cir. 1973), discussing the criteria to be applied in passing upon motions to expunge grand jury reports. The grand jury's action concerns a subject of legitimate public concern. The President has neither alleged nor established any prejudice from the grand jury's action. The strong public interest in placing before the petit jury what the grand jury believed was the full scope of the alleged conspiracy to obstruct justice which forms the basis for the indictment in *United States* v. *Mitchell, et al.* made it reasonable for the grand jury to designate all participants in the conspiracy as co-conspirators. In deference to the Office of the Presidency, and sensitive to the practical difficulties in indicting an incumbent President, the grand jury named him as an unindicted co-conspirator, and there is no constitutional impediment to such action, and no compelling reason to expunge that determination.

tem. An analogous argument was made in *Clark* and decisively rejected by this Court in a passage we are constrained to quote at length (289 U.S. at 16):

> With the aid of this analogy [to the attorney-client privilege] we recur to the social policies competing for supremacy. A privilege surviving until the relation is abused and vanishing when abuse is shown to the satisfaction of the judge has been found to be a workable technique for the protection of the confidences of client and attorney. Is there sufficient reason to believe that it will be found to be inadequate for the protection of a juror? No doubt the need is weighty that conduct in the jury room shall be untrammeled by the fear of embarrassing publicity. The need is no less weighty that it shall be pure and undefiled. A juror of integrity and reasonable firmness will not fear to speak his mind if the confidences of debate are barred to the ears of mere impertinence or malice. He will not expect to be shielded against the disclosure of his conduct in the event that there is evidence reflecting upon his honor. The chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice. It must yield to the overmastering need, so vital in our polity, of preserving trial by jury in its purity against the inroads of corruption.

It is hard to imagine a stronger need for piercing the cloak of confidentiality than in the present case. Requiring production of the evidence under these circumstances presents only a minimal threat to a President's ability to obtain advice from his aides with

complete freedom and candor, for surely there will be few occasions where there is probable cause to believe that conversations in the Executive Office of the President occurred during the course of and in furtherance of a criminal conspiracy. Counsel cannot seriously claim that the aides of any future President will be so "timid" in the face of such a remote danger of disclosure of their advice, or that some small risk of reticence is too great a price to pay to preserve the President's Office "against the inroads of corruption." In light of the grand jury's finding of probable cause to believe that the President was a co-conspirator in the indictment charging a conspiracy to defraud the United States and obstruct justice and the showing by the Special Prosecutor that the subpoenaed conversations in all probability occurred during the course of and in furtherance of the conspiracy, the conversations relating to Watergate cannot be shielded by a privilege designed to protect the objective, candid, and honest formulation of policy in government affairs.[78]

[78] Executive privilege still may attach, of course, to any subpoenaed material irrelevant to the issues to be tried in *United States* v. *Mitchell, et al.* The district court, in accordance with the procedures established in *Nixon* v. *Sirica, supra*, 487 F. 2d at 716–21, and followed thereafter, has ordered the President or any subordinate officer to submit the originals of the subpoenaed items to that court. Briefly, under those procedures, the President or his designee must submit an "analysis" itemizing and indexing those segments of the materials for which he asserts a particularized claim of privilege (*e.g.*, items subject to a claim of "national security") and those segments which he asserts are irrelevant to Watergate. The President may decline initially to submit for *in camera* inspection those

(Continued)

B. THE PUBLIC INTEREST IN DISCLOSURE OF RELEVANT CONVERSATIONS FOR USE AT TRIAL IN THIS CASE IS GREATER THAN THE PUBLIC INTEREST SERVED BY SECRECY

Even apart from the *prima facie* showing that the President and the other participants in the subpoenaed conversations were co-conspirators, the claim of privilege cannot stand here. Executive privilege, unlike personal privileges (for example, the privilege against self incrimination) is an official privilege, granted for the benefit of the public, not of executives who may happen to hold office. Thus, when this privilege is asserted in a judicial proceeding as a reason for refusing to produce evidence, the overall public interest, as determined by the Judiciary, must control. It is now settled law "that application of Executive privilege depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case." *Nixon* v. *Sirica, supra,* 487 F. 2d at 716. See, *e.g., United States* v. *Reynolds, supra,* 345 U.S. at 11; *Carr* v. *Monroe Manufacturing Co., supra,* 431 F. 2d at 388; cf. *Doe* v. *McMillan, supra,* 412 U.S. at 320.

(Continued)

items which he contends relate to "national defense or foreign relations." If there are any such claims, the district judge must hold a hearing to determine whether to sustain the claim of particularized privilege. As to all items for which there is no claim of particularized privilege or as to which the district judge rejects such a claim, the judge must inspect them *in camera* to determine which segments relate to Watergate and thus are not privileged. The judge may consult with the parties in determining relevancy.

These procedures are fully consistent with the principles set forth by this Court in *Environmental Protection Agency* v. *Mink, supra,* 410 U.S. at 92–94, and *United States* v. *Reynolds, supra,* 345 U.S. at 7–10.

Where the courts are left with the firm and abiding conviction that the public interest requires disclosure, particularly where disclosure does not pose any discernible threat to the interests protected by secrecy, the privilege must give way. Accordingly, even if the subpoenaed conversations here remain "presumptively privileged," despite the *prima facie* showing of the President's complicity, the privilege must yield. There is a compelling public interest in the availability of all relevant and material evidence for the trial of the charges in *United States* v. *Mitchell, et al.,* involving as they do a conspiracy to defraud the United States and obstruct justice by high government officials. The subpoenaed conversations consist of discussions by the defendants or other co-conspirators about the subject matter of the alleged conspiracy: Watergate. Such evidence is obviously of fundamental importance. Moreover, the public interest in continued secrecy is vastly diminished, if not nonexistent, in the wake of the extensive testimony on this subject permitted by the President and of the President's recent release of transcripts of parts of forty-three Presidential conversations relating to Watergate, including parts of twenty of the subpoenaed conversations.

1. The balancing process followed by the district court accords with decisions of this Court

In holding that the applicability of executive privilege depends upon a weighing of competing interests, the court in *Nixon* v. *Sirica* relied upon Chief Justice Marshall's decision in the misdemeanor trial of Aaron Burr. *United States* v. *Burr,* 25 Fed. Cas. 187 (No. 14,694) (C.C.D. Va. 1807). The Chief Justice, at the request of Burr, issued a subpoena *duces tecum* to the United States Attorney, who had possession of a letter written to President Jefferson by General Wilkinson.[79] In his return, the United States Attorney surrendered a copy of the letter "excepting such parts thereof as are, in my opinion, not material for the purposes of justice, for the defence of the accused, or pertinent to the issue now about to be joined." 25 Fed. Cas. at 190. In ruling that only the President could assert "motives for declining to produce a particular paper" in such a situation, the Chief Justice did recognize "that the president might receive a letter which it would be improper to exhibit in public, because of the manifest inconvenience of its exposure." 25 Fed. Cas. at 191–92. The Chief Justice, however, clearly contemplated that the court could require production even though the President's showing was entitled to "much reliance": "The occasion for demanding it ought, in such a case, to be very strong, and to be fully shown to the court before its production could be insisted on." 25 Fed. Cas. at 192.[80]

[79] This was a different letter than the one for which the Chief Justice had issued a subpoena to the President in connection with the grand jury inquiry. *United States* v. *Burr,* 25 Fed. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807).

[80] The Chief Justice continued: "The president may himself state the particular reasons which may have induced him to withhold a paper, and the court would unquestionably allow their full force to those reasons. At the same time, the court could not refuse to pay proper attention to the affidavit of the accused."

Similarly, this Court in *Reynolds, supra,* held that a claim of privilege may be rejected upon a sufficient showing (345 U.S. at 11):

> Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted.

In reversing the lower court decisions which would have required *in camera* inspection to determine whether the privilege should be upheld, this Court held merely that there had only been a "dubious" showing of necessity for access to confidential investigative reports on the crash of a bomber testing secret equipment.[51] Since state secrets were involved, the party seeking the evidence had not made the requisite threshold showing to overcome the presumptive privilege even to justify *in camera* inspection.

More recently the Court considered the government's privilege to withhold the identity of informants. *Roviaro* v. *United States, supra.* This privilege, like the privilege for government deliberations, encourages candor through secrecy. Persons are thought to be more likely to provide information to law enforcement agencies if they can remain anonymous. But the privilege is not absolute. "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." 353 U.S. at 60–61. See also *Hodgson* v. *Charles Martin Inspectors of Petroleum, Inc.,* 459 F. 2d 303, 305 (5th Cir. 1969).

[51] Justices Black, Frankfurter and Jackson dissented from the decision of the Court, relying on the opinion of Judge Maris below. 192 F. 2d 987 (3d Cir. 1951). Judge Maris, as did this Court, rejected the government's contention that the determination of the executive officer claiming the privilege must be accepted. Although Judge Maris recognized a privilege for "state secrets," he rejected the availability of a "housekeeping" privilege in an instance where the government had consented to be sued. Judge Maris predicted (192 F. 2d at 995): "[W]e regard the recognition of such a sweeping privilege against any disclosure of the internal operations of the executive departments of the Government as contrary to a sound public policy. * * * It is but a small step to assert a privilege against any disclosure of records merely because they might prove embarrasing to government officers. * * *"

2. There is a compelling public interest in trying the conspiracy charged in United States *v.* Mitchell, et al., *upon all relevant and material evidence*

Whether one views the President's assertion of privilege as entitled to "much reliance," see *United States* v. *Burr, supra,* 25 Fed. Cas. at 192, or "presumptively" valid, see *Nixon* v. *Sirica, supra,* 487 F. 2d at 717, the privilege is overcome here. In upholding the district court's order enforcing the grand jury's subpoena *duces tecum,* the court of appeals held that the "presumption of privilege * * * must fail in the face of the uniquely powerful showing made by the Special Prosecutor in this case." *Nixon* v. *Sirica, supra,* 487 F. 2d at 717. According to the court, this showing was made possible by the "unique intermeshing of events unlikely soon, if ever, to recur." 487 F. 2d at 705. It is clear that the "unique" circumstances which led to the rejection of the President's

claim of privilege in the context of a grand jury investigation have continued applicability. Indeed, now that the grand jury has returned an indictment charging a conspiracy to defraud the United States and obstruct justice, the need for full disclosure is, if anything, greater.

At the time *Nixon* v. *Sirica* was decided, the grand jury was investigating mere allegations of criminal wrongdoing by high government officials. That investigation has resulted in a finding of probable cause to believe that some of those officials have committed offenses which strike at the very essence of a "government of laws." It is precisely this type of situation where this Court has spoken of the "over-mastering" need for preserving our institutions against "the inroads of corruption," even to the extent of overcoming a privilege of confidentiality. *Clark* v. *United States, supra,* 289 U.S. at 16. The warning of the court of appeals in *Committee for Nuclear Responsibility, Inc.* v. *Seaborg, supra,* 463 F. 2d at 794, bears repeating:

> But no executive official or agency can be given absolute authority to determine what documents in his possession may be considered by the court in its task. Otherwise the head of an executive department would have the power on his own say so to cover up all evidence of fraud and corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law.

That the privilege must yield regardless of the President's involvement is easily demonstrated by analogy. Justice Cardozo's opinion in *Clark* indicated that if there were direct or substantial evidence that

a juror had accepted a bribe, the veil of secrecy ordinarily surrounding a jury's deliberations would be dissipated and the arguments and votes of even the unsuspected jurors would be admissible as evidence upon whether the putatively guilty juror had in fact taken a bribe. 289 U.S. at 16. It would seem clear that, if there were a *prima facie* showing that a high executive official had accepted a bribe in consideration of his fraudulently inducing the President to grant a pardon or take other executive action favorable to the one giving the bribe, executive privilege would not be allowed to bar proof of the official's representations to the President even though the President was totally ignorant of the wrongdoing and had acted innocently in exercising his constitutional powers. So here, regardless of the President's wish, the law cannot and does not recognize a privilege that would shield a miscreant adviser from prosecution for a criminal offense in violation of the President's confidence as well as his public trust.

It is thus immaterial whether the President was actually aware that other participants in the conversations were discussing criminal activities in which they themselves were involved. The district court below found that the Special Prosecutor had made a sufficient showing of relevancy and evidentiary value with respect to the subpoenaed conversations (Pet. App. 19–20), since the conversations are material to defining the scope, membership, and objects of the conspiracy. The public interest in laying this evidence before a jury, therefore, must be considered compelling.

The President himself emphasized this interest, albeit in the context of impeachment, in discussing the factors that persuaded him to release transcripts of portions of forty-three conversations dealing with Watergate—

> I believe all the American people, as well as their Representatives in Congress, are *entitled to have not only the facts, but also the evidence that demonstrates those facts.*[82]

This judgment is highly relevant to any balance drawn by the courts. See *Nixon* v. *Sirica, supra,* 487 F. 2d at 717–18.

Counsel for the President, in his memorandum in support of the motion to quash, argued that because the Special Prosecutor signed the indictment, he must have been satisfied that there was sufficient evidence available to him to make a *prima facie* showing of guilt, thereby suggesting that the Special Prosecutor should be content with the evidence now available to him. The indictment, of course, rests upon the requisite finding of probable cause. The standard that the government now bears, however, is proof beyond a reasonable doubt, and the public is entitled to the most effective presentation of its case that can be made. Justice will be done here only if the jury hears the whole story and not just the excerpted evidence the President chooses to make available.

[82] The President's Address to the Nation, April 29, 1974, 10 Weekly Compilation of Presidential Documents 452 (May 6, 1974).

This is not a case where the government is seeking incriminating evidence which is merely cumulative or corroborative. The analysis of the released transcripts in the Appendix submitted to the district court shows that conversations not previously available to the Special Prosecutor in fact contain evidence extremely important to material issues in the indictment—evidence that would not otherwise be available to the Special Prosecutor. See *Nixon v. Sirica, supra,* 487 F. 2d at 717.[83] Two of the principal areas are discussions re-

[83] The recordings themselves are necessary for trial, and the President's release of portions of some transcripts cannot be considered adequate compliance with the subpoena. As this Court is well aware, the recordings themselves, and not the transcripts, constitute the most reliable evidence of what actually transpired. In *Lopez* v. *United States*, 373 U.S. 427, 439–40, the Court acknowledged that recordings of admissible conversations are "highly useful evidence" and the "most reliable evidence possible of a conversation." Cf. *United States* v. *White*, 401 U.S. 745, 753. In addition to providing the most accurate reflection of what was actually spoken, the recordings also are important because they reveal tone and inflection often necessary to evaluate the meaning of spoken words.

Furthermore, a comparison of the transcripts prepared by the White House and the transcripts prepared by the Watergate Special Prosecution Force of recordings previously produced by the President reveals material differences. In some cases, the transcripts differ as to the words spoken. In other cases, a comparison indicates that the White House has failed to transcribe portions without indicating that material has been deleted or is unintelligible. A number of these discrepancies were called to the attention of the district court. See Memorandum for the United States in Opposition to the Motion to Quash Subpoena Duces Tecum 40–43. The White House transcripts also indicate that "material unrelated to Presidential actions" has been deleted. The reasonable inference to be drawn is that material has been deleted that relates to other persons' actions concern-

(Continued)

lating to the future testimony of White House officials and campaign aides and discussions of how to handle executive clemency and other benefits for various individuals as charged in the indictment. As the analysis in the Appendix shows, it is likely that the forty-four subpoenaed conversations for which no transcripts have been released include additional evidence which also is not merely cumulative or corroborative. When one is considering an on-going conspiracy, evidence of each link in the conspiracy, either in terms of time or in terms of objectives, may be crucial to a successful prosecution.[54]

(Continued)
ing Watergate. Clearly, such material is important to the prosecution of defendants in *United States* v. *Mitchell et al.*

Finally, there is some question whether the transcripts, without the underlying recordings, would be admissible under the "best evidence" rule. Generally stated, that rule provides that where a party seeks to prove the terms of a "writing," the original writing must be produced unless it is shown to be unavailable. See McCormick, *Evidence* § 230, at 560 (1972). "The danger of mistransmitting critical facts which accompanies the use of written copies or recollection, but which is largely avoided when an original writing is presented to prove its terms, justifies preference for the original documents." *Id.*, § 231, at 561. Although recordings do not fall within the strict confines of the rule, "sound recordings, where their content is sought to be proved, so clearly involve the identical considerations applicable to writings as to warrant inclusion within the rule." *Id.*, § 232, at 563.

[54] In *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, *supra*, the court of appeals ruled that the Committee's "need" for the five recordings it had subpoenaed "is too attenuated and too tangential to its functions to permit

We note that there has been not as much as a suggestion from counsel for the President that any of the subpoenaed conservations are *not* relevant to the criminal trial. Moreover, we emphasize that neither the President nor his counsel is in a position to make the refined judgments as to what evidence is necessary to the Special Prosecutor's case in chief or for use on cross-examination. Neither is familiar with the evidence in the possession of the government or with the theory on which the government's case will be prosecuted. In our adversary system, the judgments of what evidence to offer and how to use that evidence must be left to the advocates. See, *e.g., Dennis* v. *United States,* 384 U.S. 855, 874–75.

The court of appeals in *Nixon* v. *Sirica* also emphasized the impact of existing contradictory testimony. *E.g.,* 487 F. 2d at 705. Since that decision, the debate over the credibility of witnesses has heightened. On May 4, 1974, during the pendency of the present motion, the White House released a memorandum based on its expurgated transcripts, attacking the credibility of a prospective government witness, John W. Dean. 32 Congressional Quarterly 1154 (May 11, 1974). Conflicts in testimony continue. The tape re-

a judicial judgment that the President is required to comply with the Committee's subpoena" (slip op. at 17). The question the court asked was whether the recordings were "demonstrably critical to the responsible fulfillment of the Committee's functions" (slip op. at 13). Highly specific factfinding, of course, is rarely, if ever, "demonstrably critical" to the legislative function, whereas it is the very essence of the determination a trial jury is called upon to make beyond a reasonable doubt.

cordings of Presidential conversations will be critical to resolving these conflicts and weighing the credibility of trial witnesses.

3. Disclosure of the subpoenaed recordings will not significantly impair the interests protected by secrecy

It is axiomatic, of course, that once privileged communications are no longer confidential, the privilege no longer applies and the public interest no longer is served by secrecy. See, *e.g., Roviaro* v. *United States, supra,* 353 U.S. at 60. In *Nixon* v. *Sirica,* the court of appeals considered important to its calculus that "the public testimony given consequent to the President's decision [on May 22, 1973, to waive executive privilege] substantially diminishes the interest in maintaining the confidentiality of conversations pertinent to Watergate." 487 F. 2d at 718. We argue in Part IV below that, as a matter of law, the President, as a result of his May 22, 1973, statement and the recent release of transcripts of portions of forty-three Presidential conversations, has waived executive privilege with respect to any Watergate-related conversations. There simply is no confidentiality left in that subject and no justification in terms of the public interest in keeping from public scrutiny the best evidence of what transpired in Watergate-related conversations. Whether or not this Court agrees that there has been a waiver as a matter of law, the "diminished interest in maintaining the confidentiality of conversations pertinent to Watergate" is an important consideration in this case in drawing any balance.

The enforcement of the subpoena in this case marks only the most modest and measured displacement of

presumptive privacy for Presidential conversations, and augurs no general assault on the legitimate scope of that privilege. This is not a civil proceeding between private parties or even between the United States and a private party, where masses of confidential communications might be arguably relevant in wide-ranging civil discovery. The more rigorous standards applicable in a criminal case have been satisfied here, and they sharply narrow the scope of possible future demands for such evidence. Nor is this one of a long history of congressional investigations seeking to expose to the glare of publicity the policies and activities of the Executive Branch. In such instances the evidence is often sought in order to probe the mental processes of the Executive Office in a review of the wisdom or rationale of official Executive action. Compare *Morgan* v. *United States,* 304 U.S. 1, 18; *United States* v. *Morgan,* 313 U.S. 409, 422. The threat to freedom and candor in giving advice is probably at the maximum in such proceedings; they invite bringing to bear upon aides and advisors the pressures of publicity and political criticism, the fear of which may discourage candid advice and robust debate.

The charges to be prosecuted here involve high Presidential assistants and criminal conduct in the Executive Office. Such involvement is virtually unique. Because it is—hopefully—unlikely to recur, production of White House documents in this prosecution will establish no precedent to cause unwarranted fears by future Presidents and their aides or to deter them from full, frank and vigorous discussion of legit-

550-718—74——9

inate governmental issues. Indeed, future aides may well feel that the greatest danger they face in engaging in free and trusting discussion is the type of partial, one-sided revelations that the President has encouraged in this case.

4. The balance in this case overwhelmingly mandates in favor of disclosure

Certainly, courts should not lightly override the assertion of executive privilege. But the privilege is sufficiently protected if it yields only when the courts are left with the firm and abiding conviction that the public interest requires disclosure. The factors in this case overwhelmingly support a ruling that Watergate-related Presidential conversations are not privileged in response to a reasonable demand for use at the trial in *United States* v. *Mitchell, et al.* There is probable cause to believe, based upon the indictment, that high Executive officers engaged in discussions in furtherance of a criminal conspiracy in the course of their deliberations. The veil of secrecy must be lifted; the legitimate interests of the Presidency and the public demand this action.

IV. ANY PRIVILEGE ATTACHING TO THE SUBPOENAED CONVERSATIONS RELATING TO WATERGATE HAS BEEN WAIVED AS A RESULT OF PERVASIVE DISCLOSURES MADE WITH THE PRESIDENT'S EXPRESS CONSENT

Even if the conversations described in the subpoena could be regarded as covered by a privilege for executive confidentiality, the privilege cannot be claimed in the face of the President's decision to authorize voluminous testimony and other statements concerning

Watergate-related discussions and his recent release of 1,216 pages of transcript from forty-three Presidential conversations, including twenty covered by the present subpoena. In his Formal Claim of Privilege submitted to the district court, the President stated that because "[p]ortions of twenty of the conversations described in the subpoena have been made public, no claim of privilege is advanced with regard to those Watergate related portions of those conversations." This concession reflects inevitable recognition that there can be no generalized claim of executive privilege based upon confidentiality where, in fact, no confidentiality exists. "[T]he moment confidence ceases, privilege ceases." *Parkhurst* v. *Lowten,* 36 Eng. Rep. 589, 596 (Ch. 1819). But as we show below, the waiver in this case extends beyond those transcripts released publicly, since a privilege holder may not make extensive but selective disclosures concerning a subject and then withhold portions that are essential to a complete and impartial record. The circumstances of this case compel the conclusion that, as a matter of law, the President has waived executive privilege with respect to *all* Watergate-related conversations described in the subpoena.

The rule that voluntary disclosure eliminates any privilege that would otherwise attach to confidential information has been applied in cases dealing with claims of governmental privilege, *Roviaro* v. *United States, supra,* 353 U.S. 53; *Westinghouse Electric Corp.* v. *City of Burlington,* 351 F. 2d 762 (D.C. Cir. 1965), as well as in cases dealing with attorney-client

privilege, *Hunt* v. *Blackburn*, 128 U.S. 464; *United States* v. *Woodall*, 438 F. 2d 1317, 1325 (5th Cir. 1970); physician-patient privilege, *Munzer* v. *Swedish American Line*, 35 F. Supp. 493 (S.D.N.Y. 1940); and marital privilege, *Pereira* v. *United States*, 347 U.S. 1, 6. The general principles governing waiver are stated concisely and forcefully in Rule 37 of the Uniform Rules of Evidence.[85]

> A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that matter if the judge finds that he * * * without coercion and with the knowledge of his privilege, made disclosure of any part of the matter or consented to such a disclosure made by any one.

This is precisely the situation here. In his statement of May 22, 1973, the President announced, in light of the importance of the "effort to arrive at the truth," that "executive privilege will not be invoked as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in the matters presently under investigation, including the Watergate affair and the alleged cover-up."[86] As the Court can judicially notice, in the months following that statement there has been extensive testimony in several

[85] This rule was approved by the Court of Appeals for the District of Columbia Circuit in *Ellis* v. *United States*, 416 F. 2d 791, 801 n. 26 (1969). See also *United States* v. *Cote*, 456 F. 2d 142, 145 (8th Cir. 1972).

[86] 9 Weekly Compilation of Presidential Documents 697 (May 28, 1973).

forums concerning the substance of the recorded conversations now sought for use at the trial in *United States* v. *Mitchell, et al.* The testimony, as the Court is also aware, is quite often contradictory and is pervaded by hazy recollections. See also *Nixon* v. *Sirica*, *supra*, 487 F. 2d at 705.

It could be argued that the express waiver of May 22, 1973, coupled with the subsequent testimony of participants in the conversations, is itself sufficient to preclude a claim of executive privilege based upon confidentiality for Watergate-related conversations. There has been a supervening event, however, which as a matter of law removes any vestige of confidentiality in the President's discussions of Watergate with Messrs. Colson, Dean, Ehrlichman and Haldeman. On April 30, 1974, the President submitted to the Committee on the Judiciary of the House of Representatives and released to the public 1,216 pages of transcript from forty-three Watergate-related Presidential conversations.[87] The conversations range over the period from September 15, 1972, until April 27, 1973.

In his address on live television and radio on the evening prior to releasing the transcripts, the President explained that he was seeking "[t]o complete the record." He further explained: "As far as what the President personally knew and did with regard to Watergate and the cover-up is concerned, these ma-

[87] *Submission of the Recorded Presidential Conversations to the Committee on the Judiciary of the House of Representatives by President Richard Nixon, April 30, 1974.* This document was before the district court. See Transcript of Hearing on May 13, 1974.

terials—together with those already made available, will tell it all." [88] This statement is not literally accurate, but it is true that the broad outlines of the President's conversations and conduct throughout the relevant period may be portrayed by the transcripts that have been publicly released. These disclosures are sufficient to cede any privilege to conceal from production pursuant to the subpoena either the original tapes from which the publicly released transcripts were purportedly made or the tapes of other relevant conversations which necessarily complete the picture the public and the jury are entitled to see.

A privilege holder who opens the door to an area that was once confidential can no longer control the fact-finder's search for the whole truth by attempting to limit the ability to discern the interior fully. The boundaries of the disclosure are legally no longer within his exclusive control. For example, in cases involving the analogous privileges accorded to attorney-client and physician-patient communications, it is clear that once testimony has been received as to a particular communication, either with the consent of the holder of the privilege or without his objection, the privilege is lost. There can be no assertion of the privilege to block access to another version of the conversation. See, *e.g., Hunt* v. *Blackburn, supra,* 128 U.S. at 470–71; *Rosenfeld* v. *Ungar,* 25 F.R.D. 340, 342 (S.D. Iowa 1960); *Munzer* v. *Swedish American Line, supra,* 35 F. Supp. at 497–98; *In re Associated Gas &*

[88] 10 Weekly Compilation of Presidential Documents 451–52 (May 6, 1974).

Electric Co., 59 F. Supp. 743, 744 (S.D. N.Y. 1944); 8 Wigmore §§ 2327, 2389, at 636 and 855–61.

The same principles apply to the Fifth Amendment's privilege against self-incrimination. Once the privilege holder elects to disclose his version of what happened, a due "regard for the function of courts of justice to ascertain the truth" requires further disclosure "on the matters relevantly raised by that testimony." *Brown* v. *United States,* 356 U.S. 148, 156, 157. Once the privilege holder has opened the door, "he is not permitted to stop, but must go on and make a full disclosure." *Brown* v. *Walker,* 161 U.S. 591, 597.

There is still another dimension that the Court should consider. The President in the past has used the recordings of Presidential conversations to aid in the presentation of the White House interpretation of relevant events. For example, in June 1973, the White House transmitted a memorandum to the Senate Select Committee on Presidential Campaign Activities listing "certain oral communications" between the President and John W. Dean. Subsequently, but prior to Mr. Dean's testimony before the Committee, J. Fred Buzhardt, Special Counsel to the President, telephoned Fred D. Thompson, to relate to him Mr. Buzhardt's "understanding as to the substance" of twenty of the meetings.[89]

The President also has allowed, indeed requested, the recordings to be used in preparing public testi-

[89] Affidavit of J. Fred Thompson dated August 9, 1973, *Hearings before the Senate Select Committee on Presidential Campaign Activities,* 93d Cong. 1st Sess., Book 4, at 1794–1800 (1973).

mony. Defendant H. R. Haldeman, one of the respondents in the case before the Court and hardly a disinterested witness, was allowed to take home the tapes of selected conversations even after he had resigned his position as Assistant to the President and to use them in preparing his testimony.[90]

The general principle that the privilege holder's offer of his own version of confidential communications constitutes a waiver as to all communications on the same subject matter governs under these circumstances. "This is so because the privilege of secret consultation is intended only as an incidental means of defense, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former." 8 Wigmore § 2327, at 638. The President time and again—even before the existence of the recordings was publicly known—has resorted to the recordings in support of his position.[91] In short, the President cannot have it both ways. He cannot release only those portions he chooses and then stand on the privilege to conceal the remainder. No privilege holder can trifle with the judicial search for truth in this way.

[90] *Id.*, Book 7, at 2888–89; Book 8, at 3101–02.

[91] See, *e.g.*, Letter from President Richard M. Nixon to Senator Sam J. Ervin, Chairman of the Senate Select Committee on Presidential Campaign Activities, July 23, 1973, *id.*, Book 6, at 2479:

"Before their existence became publicly known, I personally listened to a number of them. The tapes are entirely consistent with what I know to be the truth and what I have stated to be the truth."

The high probability that the yet undisclosed conversations include information which will be important to resolving issues to be tried in *United States* v. *Mitchell, et al.* provides a compelling reason for disclosure. As the President himself recognized, the public interest demands the complete story based upon the impartial sifting and weighing of all relevant evidence. That is emphatically the province of the judicial process for it is "the function of a trial * * * to sift the truth from a mass of contradictory evidence. * * *" *In the Matter of Michael,* 326 U.S. 224, 227. And in the unique circumstances of this case, where there is no longer any substantial confidentiality on the subject of Watergate because the President has chosen to make far-reaching but expurgated disclosures, the Court must use its process to acquire all revelant evidence to lay before the jury. In the present context it can do so with the least consequences for confidentiality of other matters and future deliberations of the Executive Branch by ruling that there has been a waiver with respect to this entire affair.

V. THE DISTRICT COURT PROPERLY DETERMINED THAT THE SUBPOENA "DUCES TECUM" ISSUED TO THE PRESIDENT SATISFIED THE STANDARDS OF RULE 17(C), BECAUSE AN ADEQUATE SHOWING HAD BEEN MADE THAT THE SUBPOENAED ITEMS ARE RELEVANT AND EVIDENTIARY

Once the privilege issues are passed,[92] the only remaining question before the Court is whether the district judge properly found (Pet. App. 19–20) that the

[92] In the Formal Claim of Privilege which was submitted along with the Motion to Quash, the President expressly stated that he was not asserting any privilege with respect to the

government's subpoena satisfied the standards generally applied under Rule 17(c) of the Federal Rules of Criminal Procedure. The district court held that the standards of Rule 17(c) had been satisfied by the Special Prosecutor's submission of a lengthy and detailed specification setting out with particularity the relevance and evidentiary value of each of the tape recordings and other material being sought. This showing was submitted as a forty-nine page Appendix to the Memorandum for the United States in Opposition to the Motion to Quash Subpoena Duces Tecum included in the record before this Court.[93]

Enforcement of a trial subpoena *duces tecum* is preeminently a question for the trial court and is committed to the court's sound discretion. For this reason, the district court's determination should not be disturbed absent a finding by the reviewing court that it was arbitrary and had no support in the record. See *Covey Oil Co.* v. *Continental Oil Co.*, 340 F. 2d 993,

twenty conversations for which partial transcripts already have been released publicly by the White House. Since no privilege was asserted as to these conversations, no further inquiry was necessary by the district court into whether there would otherwise have been any privilege, or whether the government had a strong need for the evidence, or whether the government's need outweighed any available privilege. Thus, the Special Prosecutor's showing of relevancy and evidentiary value as to these conversations, which was held adequate to satisfy Rule 17(c), warranted enforcement of the subpoena (at least as to the portions of the tapes for which transcripts have been released) without more.

[93] Some of the material contained in the Appendix, and additional material relating to conversations of June 4, 1973, being sought by Item 46 of the subpoena, were also discussed at oral argument before the district court on May 13, 1974.

999 (10th Cir. 1965), cert. denied, 380 U.S. 964; *Sue* v. *Chicago Transit Authority*, 279 F. 2d 416, 419 (7th Cir. 1960); *Schwimmer* v. *United States*, 232 F. 2d 855, 864 (8th Cir. 1956), cert. denied, 352 U.S. 833; *Shotkin* v. *Nelson*, 146 F. 2d 402 (10th Cir. 1944). This is especially true where, as here, the assessment of the relevancy and evidentiary value of the items sought is primarily a determination of fact and the district judge is intimately familiar with the grand jury's investigation and the indictment in the case. Since the district court's findings are amply supported by the record and reflect the application of the proper legal criteria, those findings should not be disturbed by this Court. Indeed, in the absence of any dispute between the parties on the correctness of the legal principles applied by the district court under Rule 17(c), this essentially factual determination ordinarily would not merit review by this Court at all. In the interest of final disposition of the case, however, we urge the Court to uphold the lower court's action on this aspect of the case as well.

A. RULE 17(C) PERMITS THE GOVERNMENT TO OBTAIN RELEVANT, EVIDENTIARY MATERIAL SOUGHT IN GOOD FAITH FOR USE AT TRIAL

Rule 17(c) provides:

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be pro-

> duced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

As all parties and the district court recognized (Pet. App. 19), the leading cases establishing the criteria for satisfaction of Rule 17(c) are *Bowman Dairy Co.* v. *United States, supra,* 341 U.S. 214, and *United States* v. *Iozia,* 13 F.R.D. 335 (S.D.N.Y. 1952). See generally 8 Moore, Federal Practice ¶ 17.07 (1973). In *Bowman Dairy,* the Court held that the government properly had been ordered, under Rule 17(c), to produce to the defendant prior to trial all documents, books, records, and objects gathered by the government during its investigation or preparation for trial which were either presented to the grand jury or would be offered as evidence at trial. The Court upheld the order to produce even though the defendant's subpoena did not further specify particular items sought.

In *Iozia,* the question presented was whether defendant properly could obtain material from the government under Rule 17(c) upon a mere showing that it might be material to the preparation of the defense. The district court, elaborating upon the *Bowman Dairy* standard, declared that a mere showing of possible use in pre-trial preparation was insufficient: the defendant must show (1) that the material was evidentiary and relevant, (2) that it was not otherwise procurable reasonably in advance of trial, (3) that the party seeking it could not properly prepare for trial

without it and failure to obtain it might delay trial, and (4) that the request was made in good faith and did not constitute a general "fishing expedition." These were the tests the district court below stated it was applying when it found that "the requirements of Rule 17(c) are here met" (Pet. App. 20).

The standard of relevancy established by these cases is clear. Material being sought under Rule 17(c) is relevant if it is "related to the charges" in the indictment, *United States* v. *Gross,* 24 F.R.D. 138, 140 (S.D.N.Y. 1959), or "closely related to the subject matter of the indictment," *United States* v. *Iozia, supra,* 13 F.R.D. at 339, even though it might not, for example, "serve to exonerate this defendant of the crime charged * * *." *Ibid.*

In contrast, the requirement that the material sought be "evidentiary" has not been as well defined in the case law. See 8 Moore, *supra,* ¶ 17.07, at 17–19. In the district court, counsel for the President asserted that under Rule 17(c) the government must show that the items sought would be admissible at trial in its case in chief. The reported decisions, however, show that the purpose of the "evidentiary" requirement articulated in *Bowman* and *Iozia* is to oblige the party seeking production to show that the items sought are of a character that they could be used in the trial itself, not simply for general pre-trial preparation. Thus, a subpoena can seek not only evidence that would be admissible in the party's direct case but can also demand material that could be used for impeachment purposes. "Rule 17(c) is applicable only

to such documents or objects as would be admissible in evidence at the trial, or which may be used for impeachment purposes." *United States* v. *Carter,* 15 F.R.D. 367, 371 (D.D.C. 1954) (Holtzoff, J.). See also 8 Moore, *supra,* ¶ 17.07, n. 16 ("the documents sought must be admissible in evidence (at least for the purpose of impeachment)").[24] For example, evidentiary material sought by the government such as prior inconsistent statements by defendants, even if not pertinent in the government's case in chief, would be admissible for purposes of impeachment if a defendant took the stand or in the government's rebuttal case.

Moreover, the "evidentiary" requirement of *Bowman Dairy* and *Iozia* has developed almost exclusively in cases in which defendants sought material prior to trial from the government in addition to that to which they were entitled by the comprehensive pre-trial discovery provisions of Rule 16 of the Federal Rules of Criminal Procedure. Courts have, therefore, taken special care, as the *Bowman* and *Iozia* opinions show, to insure that Rule 17(c) not be used as a device to circumvent the limitations on criminal pre-trial dis-

[24] In his Reply Memorandum below, counsel for the President argued that the Special Prosecutor's reliance on *Carter* and related cases was misleading because in some of those cases *pre-trial* production of material admissible for impeachment of witness was in fact denied. In the instant case, of course, the necessity of pre-trial production is predicated on the government's showing—apparently not contested by counsel for the President—that delaying production of the recordings until trial would not allow adequate time for testing, enhancement, transcription, and preparation of the evidence that would be required for actual use at trial.

covery embodied in Rule 16. Rule 16 provides only for discovery from the parties. By contrast, in the instant case the government seeks material from what is in effect, as the district court observed, a third party. As applied to evidence in the possession of third parties, Rule 17(c) simply codifies the traditional right of the prosecution or the defense to seek evidence for trial by a subpoena *duces tecum.* Whether the stringent standards developed in *Bowman Dairy* and *Iozia* for Rule 17(c) subpoenas between the prosecution and the defense should be applied to subpoenas to third parties is a question the Court need not reach, however, since the court below correctly found that the Special Prosecutor had fully met even the higher standards.

The final requirement enunciated in *Iozia,* that the application be made "in good faith" and not "as a general fishing expedition," appears to be simply a requirement that the materials sought be sufficiently identifiable that the court can make a determination that they exist, that they are relevant, and that they would have some evidentiary use at trial. Indeed, the standard most often applied after *Iozia* in determining enforceability of subpoenas under Rule 17(c) appears to be a combination of the *Iozia* requirements of relevancy, evidentiary value, and good faith: the subpoena must be an "honest effort to obtain evidence for use on trial." *United States* v. *Gross, supra,* 24 F.R.D. at 141; *United States* v. *Solomon,* 26 F.R.D. 397, 407 (S.D. Ill. 1960); *United States v. Jannuzio,* 22 F.R.D. 223 (D. Del. 1958).

In the district court, counsel for the President took the position that a subpoena should be considered a "fishing expedition" unless the party seeking its enforcement can make a *conclusive* showing that each and every item sought is, beyond doubt, both relevant and evidentiary. As to the majority of conversations involved in the subpoena, this standard is satisfied by consideration of the transcripts made public by the White House, uncontradicted testimony, and other evidence. As to the remaining conversations, there is strong and unrebutted circumstantial evidence—the inferences from which are not denied—indicating that the standard is met.

But the position urged by counsel for the President is not supported and indeed is contradicted by the reported decisions. For instance, the subpoena held enforceable in *Bowman Dairy* was directed to all material in the government's possession that had been presented to the grand jury in the course of the investigation or that would be presented at trial, without further specificity. The subpoena held enforceable in *Iozia* was directed at certain documents, correspondence, and files of a former associate of the defendant. The defendant alleged that he had reason to believe that certain activities may have been engaged in by still other persons and that the former associate was "in the best position to know" about these if they indeed occurred. The cases realistically recognize that the party seeking production often cannot know precisely what is contained in the material sought until he has the opportunity to inspect it. The Court in *Bowman*

Dairy, for example, quoted with approval the statement of a member of the Advisory Committee on the Criminal Rules, to the effect that the purpose of Rule 17(c) was to permit a court to order production in advance of trial "for the purpose of course of enabling the party to see whether he can use it or whether he wants to use it." 341 U.S. at 220 n. 5. Common sense dictates that the party seeking production cannot tell what it "can or will use until it has had the opportunity to see the documents." *United States* v. *Gross, supra,* 24 F.R.D. at 141. As Chief Justice Marshall observed in considering a trial subpoena *duces tecum* directed to President Jefferson in *United States* v. *Burr, supra,* 25 Fed. Cas. at 191: "It is objected that the particular passages of the letter which are required are not pointed out. But how can this be done while the letter itself is withheld?"

Because the Special Prosecutor has been denied even preliminary access to the subpoenaed materials, it is obviously impossible for him to demonstrate *conclusively* with respect to a small number of the conversations that they are relevant and evidentiary. But Rule 17(c) and the cases interpreting it do not require that this be done. Rather, they require only that an adequate showing of relevancy and evidentiary value be made, based upon the evidence available. In short,

> A predetermination of the admissibility of the subpoenaed material is not the criterion of the validity of the process. It need only appear that the subpoena is being utilized in good faith to

obtain evidence * * * [citing *Bowman Dairy*]. *United States* v. *Jannuzio, supra,* 22 F.R.D. at 226.

B. THERE WAS AMPLE SUPPORT FOR THE FINDING OF THE DISTRICT COURT THAT THE GOVERNMENT'S SHOWING OF RELEVANCY AND EVIDENTIARY VALUE WAS ADEQUATE TO SATISFY RULE 17(C)

1. Relevance

Transcripts released to the public by the White House, uncontradicted testimony concerning the subject matter of certain conversations, and other evidence compiled in the Special Prosecutor's showing establish beyond any question the relevancy of the vast majority of the subpoenaed conversations.[95] Indeed, the White House transcripts that have been released of twenty of the subpoenaed conversations not only show conclusively the relevancy of those conversations but also tend to prove the relevancy of the rest of the sixty-four conversations sought by the subpoena.[96]

[95] In some instances tape recordings already obtained by the Special Prosecutor contain strong evidence of the relevancy of additional conversations sought under this subpoena. For example, it was pointed out in oral argument in the district court that the June 4, 1973, recording of the President listening to prior recordings indicates why the March 13, 1973, telephone conversations sought by Item 46 of the subpoena are important. See Transcript of Hearing on May 13, 1974, at 57.

[96] As pointed out below, the transcripts in some instances provide circumstantial evidence concerning what happened at meetings for which no transcripts were released. In addition, the Court certainly may take notice of the fact that each and every subpoenaed conversation for which a transcript was subsequently released did in fact substantially concern Watergate.

With respect to some of the conversations, particularly those listed in Items 32–40 of the subpoena, relevancy can be established at this time only by circumstantial and indirect evidence. Nevertheless, the available evidence that these conversations—all of which took place in the three days from April 18 to April 20, 1973—in fact concerned Watergate is strong. The evidence, set forth in detail in the government's Appendix below, shows that the primary subject of concern to the participants in the meetings sought over those three days—the President and defendants Haldeman and Ehrlichman—was Watergate; that Haldeman and Ehrlichman had withdrawn from their regular White House duties to work exclusively on a Watergate defense; and that meetings between these three persons very probably could have concerned only Watergate. Furthermore, with respect to these conversations, the evidence that is available is unrebutted. The Special Prosecutor argued below that since only the President was in a position to make more informed representations about the relevancy of the subpoenaed conversations, the showing made by the Special Prosecutor was at least sufficient to shift the burden to the President to demonstrate any alleged irrelevancy to the district court by providing the appropriate recordings for *in camera* inspection. In subsequent oral argument in the district court counsel to the President, responding to direct ques-

tions from the court, stated that he could make no representations whatever concerning the relevancy *vel non* of any of the subpoenaed conversations.[97]

2. Evidentiary Nature

Tape recordings of conversations are admissible as evidence upon the laying of a proper and adequate foundation showing that "the recording as a whole [is] accurate and sufficiently complete."[98] This foundation may be laid by the testimony of one of the participants in the conversation that the recording accurately represents the conversation that was held.[99] Alternatively, the government could introduce a recording in its direct case even if none of the participants were available as a prosecution witness by showing the circumstances and method by which the recording was made and the chain of custody of the particular recording sought to be introduced.[100]

There can be no doubt that the tape recordings sought by the subpoena here, covering conversations of co-conspirators relating to the subject matter of

[97] Transcript of Hearing, May 13, 1973, at 61–62.

[98] *Stubbs* v. *United States*, 428 F. 2d 885, 888 (9th Cir. 1970), cert. denied, 400 U.S. 1009; *United States* v. *McKeever*, 160 F. Supp. 426 (S.D.N.Y. 1958).

[99] *United States* v. *Madda*, 345 F. 2d 400, 403 (7th Cir. 1965).

[100] See *Stubbs* v. *United States*, *supra;* cf. *United States* v. *Sutton*, 426 F. 2d 1202, 1207 (D.C. Cir. 1969) (authentication of writings); Proposed Federal Rules of Evidence, Rule 901 (b)(9).

the alleged conspiracy, are of an evidentiary character. In *Nixon* v. *Sirica, supra,* in upholding enforcement of an earlier subpoena for Presidential tapes, the court squarely held: "Where it is proper to testify about oral conversations, taped recordings of those conversations are admissible as probative and corroborative of the truth concerning the testimony." 487 F. 2d at 718 (footnote omitted). The same principle would apply to use of such recordings for impeachment purposes. Such materials are, therefore, amenable to a trial subpoena. In *Monroe* v. *United States,* 234 F. 2d 49, 55 (D.C. Cir. 1956), cert. denied, 352 U.S. 873, the court of appeals held that tape recordings made by a police officer of conversations between himself and defendants were "admissible as independent evidence of what occurred" and that they "were evidentiary, and therefore under the interpretation of Rule 17(c) adopted by the Supreme Court [in *Bowman Diary*] and already followed by this Court, the trial court in its discretion could have required pre-trial production."[101] See also *United States* v. *Lemonakis,* 485 F. 2d 941 (D.C. Cir. 1973), cert. denied, —— U.S. —— (42 U.S.L.W. 3541, March 26, 1974).

Statements recorded on tapes sought by the instant subpoena, while hearsay for some purposes, but see

[101] The court upheld the district court's exercise of discretion not to compel production prior to trial because the government had already played the recordings for defendant and his counsel over a period of several days.

Anderson v. *United States*, —— U.S. —— (42 U.S.L.W. 4815, June 3, 1974), would be admissible into evidence in the government's case in chief under one or more of the traditional exceptions to the hearsay rule.

First, it is settled that extra-judicial admissions made by one conspirator in the course of and in furtherance of a conspiracy are admissible against his fellow co-conspirators. *Dutton* v. *Evans*, 400 U.S. 74, 81 (1970); *Myers* v. *United States*, 377 F. 2d 412, 418–19 (5th Cir. 1967), cert. denied, 390 U.S. 929. Each of the principal participants in the subpoenaed conversations either has been indicted as a conspirator or will be named as an unindicted co-conspirator in the government's bill of particulars. As the Special Prosecutor demonstrated in his showing, the transcripts released by the White House, together with both direct and circumstantial evidence, establish a very strong probability that substantial portions of each and every one of the subpoenaed conversations occurred in the course of and in furtherance of the conspiracy alleged in the indictment. Subject to proof of this fact at trial, any recorded statements in furtherance of the conspiratorial objectives made by any one of the conspirators in the course of these conversations would be admissible under the co-conspirator exception to the hearsay rule.

Second, even absent proof *aliunde* that each and every subpoenaed conversation was held in the furtherance of the conspiracy, any relevant taped extra-judicial statements made by defendants Haldeman or

Ehrlichman would be admissible in the government's case in chief against that particular defendant. *On Lee* v. *United States*, 343 U.S. 747, 756; *United States* v. *Lemonakis*, *supra*, 485 F. 2d at 949.

Furthermore, other recorded statements made during these conversations may be useful to the government for the purpose of impeaching defendants Haldeman or Ehrlichman should they elect to testify in their own behalf. *E.g.*, *Calumet Broadcasting Corp.* v. *FCC*, 160 F. 2d 285, 288 (D.C. Cir. 1947); *United States* v. *McKeever*, 169 F. Supp. 426, 430 (S.D.N.Y. 1958). And statements on the tapes by government witnesses would be admissible to show the witnesses' prior consistent statements, should the defense attack the witnesses' credibility or the truth of their testimony on cross-examination.[102]

The Special Prosecutor's showing submitted to the district court listed, by individual subpoenaed conversation, the admissions and other statements that are contained in the recordings (according to the White House transcripts released to the public) or should be found therein (according to sworn testimony and other evidence) which would be admissible for one or more of the above-stated reasons. With respect to those conversations in late April 1973 about which there has not been detailed testimony and for which

[102] See *Monroe* v. *United States*, *supra*. Prior consistent statements have traditionally been admissible only to rebut charges of recent fabrication or improper influence or motive, but the Proposed Federal Rules of Evidence, Rule 801(d)(1)(B), would permit use of such statements as substantive evidence as well.

transcripts have not been made public by the White House, the Special Prosecutor argued below that the rich evidentiary vein running through the conversations already released constituted a sufficient showing that similar statements are likely to be contained in those not yet disclosed. Again, this showing was at least sufficient to shift the burden to the President to demonstrate, by submission of tape recordings of these conversations to the Court for *in camera* inspection or at least by certification of counsel, that no evidentiary material was in fact contained therein.

3. Need for the evidence prior to trial

In his affidavit in connection with the Motion of the United States for issuance of the subpoena, the Special Prosecutor stated that based on experience with other Presidential recordings a considerable amount of time would be necessary to analyze and transcribe the tapes sought by the instant subpoena and that pretrial production of the tapes was therefore warranted under Rule 17(c). At no point below has counsel for the President sought to contest this showing. A considerable amount of time is required to listen and relisten to recordings and filter or enhance them where necessary, to make accurate transcripts, to select and prepare relevant portions for trial, and to make copies for defendants where appropriate under the discovery rules. Moreover, much of this work can be performed only by attorneys knowledgeable about the case who must simultaneously prepare all other aspects of the case for trial. The Court should be advised that the

Special Prosecutor's staff originally estimated that the simple physical process described above of preparing the recordings sought for trial would require at least two months.

For these reasons, the district court correctly held that the subpoenaed items were genuinely needed prior to trial for preparation of the case and to avoid delay of the trial itself.

CONCLUSION

Settled principles of law, therefore, lead inevitably to the conclusion that the order of the district court, denying the President's motion to quash the subpoena *duces tecum* and directing compliance with it, and denying the motion to expunge the grand jury's action listing him as an unindicted co-conspirator, should be affirmed in all respects.

Respectfully submitted.

LEON JAWORSKI,
Special Prosecutor.
PHILIP A. LACOVARA,
Counsel to the Special Prosecutor.

Attorneys for the United States.

JUNE 1974.

550-718—74——11

APPENDIX

Applicable Provisions of Constitution, Statutes, Rules, and Regulations

1. The Constitution of the United States provides in pertinent part—

Article II, Section 1:

> The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows
>
> * * * * *

Article II, Section 2:

> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.
>
> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein

otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

* * * * *

Article II, Section 3:

* * * he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Article III, Section 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * * * *

2. Title 5, United States Code, provides in pertinent part—

§ 301. DEPARTMENTAL REGULATIONS.

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

Title 28, United States Code, provides in pertinent part—

§ 509. FUNCTIONS OF THE ATTORNEY GENERAL.

All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General except the functions—

(1) vested by subchapter II of chapter 5 of title 5 in hearing examiners employed by the Department of Justice;

(2) of the Federal Prison Industries, Inc.;

(3) of the Board of Directors and officers of the Federal Prison Industries, Inc.; and

(4) of the Board of Parole.

§ 510. DELEGATION OF AUTHORITY.

The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

§ 515. AUTHORITY FOR LEGAL PROCEEDINGS; COMMISSION, OATH, AND SALARY FOR SPECIAL ATTORNEYS.

(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand

jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

* * * * *

§ 516. CONDUCT OF LITIGATION RESERVED TO DEPARTMENT OF JUSTICE.

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

§ 517. INTERESTS OF UNITED STATES IN PENDING SUITS.

The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

§ 518. CONDUCT AND ARGUMENT OF CASES.

(a) Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested.

(b) When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so.

§ 519. SUPERVISION OF LITIGATION.

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

3. Rule 17, Federal Rules of Criminal Procedure, provides in pertinent part—

SUBPOENA

* * * * *

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

* * * * *

4. Department of Justice Order No. 551–73 (Nov. 2, 1973) 38 Fed. Reg. 30,738 adding 28 C.F.R. §§ 0.37, and 0.38, and Appendix to Subpart G–1, provides

TITLE 28—JUDICIAL ADMINISTRATION

CHAPTER I—DEPARTMENT OF JUSTICE

Part O—Organization of the Department of Justice

Order No. 551–73

Establishing the Office of Watergate Special Prosecution Force

By virtue of the authority vested in me by 28 U.S.C. 509, 510 and 5 U.S.C. 301, there is hereby established in the Department of Justice, the Office of Watergate Special Prosecution Force, to be headed by a Director. Accordingly, Part O of Chapter I of Title 28, Code of Federal Regulations, is amended as follows:

1. Section 0.1(a) which lists the organization units of the Department, is amended by adding "Office of Watergate Special Prosecution Force" immediately after "Office of Criminal Justice."

2. A new Subpart G–1 is added immediately after Subpart G, to read as follows:

"Subpart G–1—Office of Watergate Special Prosecution Force

§ 0.37 GENERAL FUNCTIONS.

The Office of Watergate Special Prosecution Force shall be under the direction of a Director who shall be the Special Prosecutor appointed by the Attorney General. The duties and responsibilities of the Special Prosecutor are set forth in the attached appendix which is incorporated and made a part hereof.

§ 0.38 SPECIFIC FUNCTIONS.

The Special Prosecutor is assigned and delegated the following specific functions with respect to matters specified in this Subpart:

(a) Pursuant to 28 U.S.C. 515(a), to conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings, which United States attorneys are authorized by law to conduct, and to designate attorneys to conduct such legal proceedings.

(b) To approve or disapprove the production or disclosure of information or files relating to matters within his cognizance in response to a subpoena, order, or other demand of a court or other authority. (See Part 16(B) of this chapter.)

(c) To apply for and to exercise the authority vested in the Attorney General under 18 U.S.C. 6005 relating to immunity of witnesses in Congressional proceedings.

The listing of these specific functions is for the purpose of illustrating the authority entrusted to the Special Prosecutor and is not intended to limit in any manner his authority to carry out his functions and responsibilities."

ROBERT H. BORK,
Acting Attorney General.

Date: November 2, 1973.

APPENDIX

Duties and Responsibilities of the Special Prosecutor

The Special Prosecutor

There is appointed by the Attorney General, within the Department of Justice, a Special Prosecutor to whom the Attorney General shall delegate the authorities and provide the staff and other resources described below.

The Special Prosecutor shall have full authority for investigating and prosecuting offenses against the United States arising out of the unauthorized entry into Democratic National Committee Headquarters at the Watergate, all offenses arising out of the 1972 Presidential Election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the President, members of the White House staff, or Presidential appointees, and any other matters which he consents to have assigned to him by the Attorney General.

In particular, the Special Prosecutor shall have full authority with respect to the above matters for:

—conducting proceedings before grand juries and any other investigations he deems necessary;
—reviewing all documentary evidence available from any source, as to which he shall have full access;
—determining whether or not to contest the assertion of "Executive Privilege" or any other testimonial privilege;
—determining whether or not application should be made to any Federal court for a grant of immunity to any witness, consistently with applicable statutory requirements, or for warrants, subpoenas, or other court orders;

—deciding whether or not to prosecute any individual, firm, corporation or group of individuals;
—initiating and conducting prosecutions, framing indictments, filing informations, and handling all aspects of any cases within his jurisdiction (whether initiated before or after his assumption of duties), including any appeals;
—coordinating and directing the activities of all Department of Justice personnel, including United States Attorneys;
—dealing with and appearing before Congressional committees having jurisdiction over any aspect of the above matters and determining what documents, information, and assistance shall be provided to such committees.

In exercising this authority, the Special Prosecutor will have the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice. The Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions. The Special Prosecutor will determine whether and to what extent he will inform or consult with the Attorney General about the conduct of his duties and responsibilities. In accordance with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining

that their consensus is in accord with his proposed action.

Staff and Resource Support

1. *Selection of Staff.*—The Special Prosecutor shall have full authority to organize, select, and hire his own staff of attorneys, investigators, and supporting personnel, on a full or part-time basis, in such numbers and with such qualifications as he may reasonably require. He may request the Assistant Attorneys General and other officers of the Department of Justice to assign such personnel and to provide such other assistance as he may reasonably require. All personnel in the Department of Justice, including United States Attorneys, shall cooperate to the fullest extent possible with the Special Prosecutor.

2. *Budget.*—The Special Prosecutor will be provided with such funds and facilities to carry out his responsibilities as he may reasonably require. He shall have the right to submit budget requests for funds, positions, and other assistance, and such requests shall receive the highest priority.

3. *Designation and Responsibility.*—The personnel acting as the staff and assistants of the Special Prosecutor shall be known as the Watergate Special Prosecution Force and shall be responsible only to the Special Prosecutor.

Continued Responsibilities of Assistant Attorney General, Criminal Division.—Except for the specific investigative and prosecutorial duties assigned to the Special Prosecutor, the Assistant Attorney General in charge of the Criminal Division will continue to exercise all of the duties currently assigned to him.

Applicable Departmental Policies.—Except as otherwise herein specified or as mutually agreed between

the Special Prosecutor and the Attorney General, the Watergate Special Prosecution Force will be subject to the administrative regulations and policies of the Department of Justice.

Public Reports.—The Special Prosecutor may from time to time make public such statements or reports as he deems appropriate and shall upon completion of his assignment submit a final report to the appropriate persons or entities of the Congress.

Duration of Assignment.—The Special Prosecutor will carry out these responsibilities, with the full support of the Department of Justice, until such time as, in his judgment, he has completed them or until a date mutually agreed upon between the Attorney General and himself.

5. Department of Justice Order No. 554–73 (Nov. 19, 1973), 38 Fed. Reg. 32,805, amending 28 C.F.R. Appendix to Subpart G–1, provides—

TITLE 28—JUDICIAL ADMINISTRATION

CHAPTER I—DEPARTMENT OF JUSTICE

Part O—Organization of the Department of Justice

Subpart G–1—Office of Watergate Special Prosecution Force

Order No. 554–73

AMENDING THE REGULATIONS ESTABLISHING THE OFFICE OF WATERGATE SPECIAL PROSECUTION FORCE

By virtue of the authority vested in me by 28 U.S.C. 509, 510 and 5 U.S.C. 301, the last sentence of the fourth paragraph of the Appendix to Subpart G–1 is amended to read as follows: "In accordance

with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, (1) the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action, and (2) the jurisdiction of the Special Prosecutor will not be limited without the President's first consulting with such Members of Congress and ascertaining that their consensus is in accord with his proposed action."

ROBERT H. BORK,
Acting Attorney General.

Date: November 19, 1973.

6. The letter from the Acting Attorney General to the Special Prosecutor on November 21, 1973, stating the intention of Department of Justice Order No. 554–73, is as follows—

OFFICE OF THE SOLICITOR GENERAL,
Washington, D.C. 20530, November 21, 1973.

LEON JAWORSKI, Esq.,
Special Prosecutor,
Watergate Special Prosecution Force,
1425 K Street, N.W..
Washington, D.C. 20005

DEAR MR. JAWORSKI: You have informed me that the amendment to your charter of November 19, 1973 has been questioned by some members of the press. This letter is to confirm what I told you in our telephone conversation. The

amendment of November 19, 1973 was intended to be, and is, a safeguard of your independence.

The President has given his assurance that he would not exercise his constitutional powers either to discharge the Special Prosecutor or to limit the independence of the Special Prosecutor without first consulting the Majority and Minority leaders and chairmen and ranking members of the Judiciary Committees of the Senate and the House, and ascertaining that their consensus is in accord with his proposed action.

When that assurance was worked into the charter, the draftsman inadvertently used a form of words that might have been construed as applying the President's assurance only to the subject of discharge. This was subsequently pointed out to me by an assistant and I had the amendment of November 19 drafted in order to put beyond question that the assurance given applied to your independence under the charter and not merely to the subject of discharge.

There is, in my judgment, no possibility whatever that the topics of discharge or limitation of independence will ever be of more than hypothetical interest. I write this letter only to repeat what you already know: the recent amendment to your charter was to correct an ambiguous phrasing and thus to make clear that the assurances concerning congressional consultation and consensus apply to all aspects of your independence.

Sincerely,

ROBERT H. BORK,
Acting Attorney General.

U.S. GOVERNMENT PRINTING OFFICE: 1974

Nos. 73-1766, 73-1834

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, ET AL., RESPONDENTS

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON APPELLATE JURISDICTION

LEON JAWORSKI,
Special Prosecutor,
PHILIP A. LACOVARA,
Counsel to the Special Prosecutor,
Watergate Special Prosecution Force,
Department of Justice,
1425 K Street N.W.,
Washington, D.C. 20005.
Attorneys for the United States.

INDEX

	Page
Questions presented	1
Constitutional provision and statutes involved	2
Introduction	3
Statement	4
Argument	6
I. The order of the district court requiring the President to produce evidence for *in camera* inspection is appealable	6
II. This Court has jurisdiction to entertain and decide the petition for mandamus transmitted by the court of appeals to this Court	10
A. Review of the mandamus petition is authorized by 28 U.S.C. 1254(1)	10
B. The Court has appellate jurisdiction under Article III	13
C. Alternatively, jurisdiction can be rested on the All Writs Act, 28 U.S.C. 1651(a)	15
Conclusion	16

CITATIONS

Cases:

Alexander v. *United States*, 201 U.S. 117	6–7
Brady v. *Maryland*, 373 U.S. 83	5
Chandler v. *Judicial Council of the Tenth Circuit*, 398 U.S. 74	14
Cobbledick v. *United States*, 309 U.S. 323	6, 9, 10
Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541	6, 8, 9, 10
DeBeers Consolidated Mines Ltd. v. *United States*, 325 U.S. 212	15
Eisen v. *Carlisle & Jacquelin*, — U.S. — (42 U.S.L.W. 4804, May 28, 1974)	8, 9, 10
Ex parte Peru, 318 U.S. 578	14, 15
Ex parte United States, 287 U.S. 241	14, 15
Gay v. *Ruff*, 292 U.S. 25	12
House v. *Mayo*, 324 U.S. 42	15

Cases—Continued — Page

Land v. *Dollar*, 190 F. 2d 623 (D.C. Cir. 1951), vacated as moot, 344 U.S. 806 — 8
Marbury v. *Madison*, 1 Cranch 137 — 13, 14
Matter of 620 Church St. Building Corp., 299 U.S. 24 — 15
McCullough v. *Cosgrave*, 309 U.S. 634 — 14, 15
Nixon v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973) — 7, 8–9, 11
Nixon v. *Sirica* (D.C. Cir. No. 74–1618, June 18, 1974) — 9
Roche v. *Evaporated Milk Ass'n*, 319 U.S. 21 — 11
Schlagenhauf v. *Holder*, 379 U.S. 104 — 11
United States Alkali Export Ass'n. v. *United States*, 325 U.S. 196 — 15
United States v. *Bankers Trust Co.*, 294 U.S. 240 — 13
United States v. *Isaacs and Kerner*, 493 F. 2d 1194 (7th Cir. 1974), cert. denied, — U.S. — (June 17, 1974) — 8
United States v. *Mitchell et al.*, D.D.C. Crim. No. 74–110 — 9
United States v. *Ryan*, 402 U.S. 530 — 6, 7–8, 10
United States v. *United Mine Workers*, 330 U.S. 258 — 13
United States v. *United States District Court*, 444 F. 2d 651 (6th Cir. 1971), affirmed, 407 U.S. 297 — 11
Will v. *United States*, 389 U.S. 90 — 11
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 — 13

Constitution, Statutes and Rules:

Article III — 2, 4, 12, 13, 14, 15
28 U.S.C. 1254 — 3, 4, 6, 10, 11, 12, 14, 15
28 U.S.C. 1291 — 5, 6, 7, 8, 10
28 U.S.C. 1651 — 3, 4, 6, 10, 15
28 U.S.C. 2101 — 3, 12
28 U.S.C. 2106 — 14
Rule 20, Supreme Court Rules — 12
Rule 23(c), Supreme Court Rules — 5
Rule 30, Supreme Court Rules — 14
Rule 31(2), Supreme Court Rules — 15
Rule 21(a), Federal Rules of Appellate Procedure — 4
Rule 21(b), Federal Rules of Appellate Procedure — 12

Miscellaneous:

Stern & Gressman, *Supreme Court Practice* (4th ed. 1969) — 13, 14

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73–1766

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, ET AL., RESPONDENTS

No. 73–1834

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON APPELLATE JURISDICTION

QUESTIONS PRESENTED

1. Whether the District Court order of May 20, 1974, requiring the President to submit certain evidence to the court for *in camera* inspection, is an appealable order.

2. Whether this Court has jurisdiction to entertain and decide the petition for mandamus, seeking review of the district court's order requiring the President to submit certain evidence to the court for *in camera* inspection, transmitted to this Court by the Court of Appeals.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article III, Section 2 of the Constitution of the United States provides in pertinent part—

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

* * * * * *

Section 1254 of Title 28 of the United States Code provides in pertinent part—

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree;

* * * * *

Section 1651(a) of Title 28 of the United States Code provides—

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Section 2101(e) of Title 28 of the United States Code provides—

> An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

INTRODUCTION

The United States files this Supplemental Brief on Appellate Jurisdiction in response to the order of this Court of June 15, 1974, requesting the parties to brief and argue, in addition to the questions presented by the petition for certiorari (No. 73-1766), the cross-petition for certiorari (No. 73-1834) and the petition for a writ of mandamus filed in the court

of appeals (D.C. Cir. No. 74–1532), the following questions:

(a) Is the District Court order of May 20, 1974, an appealable order?

(b) Does this Court have jurisdiction to entertain and decide the petition for mandamus transmitted by the Court of Appeals to this Court?

The United States respectfully submits that both questions must be answered affirmatively and that the jurisdiction of this Court to review the decision of the district court rests alternatively on 28 U.S.C. 1254(1) and 1651.

STATEMENT

On May 24, 1974, pursuant to 28 U.S.C. 1651 and Rule 21(a) of the Federal Rules of Appellate Procedure, the President filed in the court of appeals a petition for a writ of mandamus seeking an order directing the district court to vacate its order of May 20, which had denied the President's motion to quash the subpoena *duces tecum* and his motion to expunge the grand jury's naming of him as an unindicted co-conspirator and which had ordered compliance with the subpoena. The petition was duly docketed in the court of appeals and assigned Docket Number 74–1532. On the same day, the President filed a notice of appeal from the district court's order and the district court record was docketed in the court of appeals under Docket Number 74–1534.

Later on May 24, the United States filed a petition for certiorari before judgment (No. 73–1766) seeking review of those cases in the court of appeals and

describing five questions presented by those cases, including questions that covered the issues raised by Issue (b) of the President's mandamus petition in the court of appeals, relating to the district court's order overruling the claim of privilege and ordering compliance with the subpoena. The President's cross-petition for a writ of certiorari before judgment (No. 73–1834), filed on June 6, 1974, raises the question presented as Issue (d) in the mandamus petition, involving the district court's refusal to expunge the grand jury's finding concerning the President. Issue (a) of the mandamus petition, relating to the jurisdiction of the district court to decide an "intra-executive dispute," was not explicitly presented as a question in either certiorari petition, but is being addressed in the briefs in this Court as a jurisdictional issue.

Issue (c) of the mandamus petition, relating to the application of *Brady* v. *Maryland*, 373 U.S. 83, to privileged material not in the prosecutor's possession, is not raised separately in either petition. The district court expressly refused to pass upon that question as a ground for ordering compliance with the subpoena, and it is doubtful that it was properly before the court of appeals. Thus, the three viable issues raised in the President's petition for mandamus are "fairly comprised" within the questions framed by the parties in seeking certiorari before judgment. See Sup. Ct. Rule 23(c).

It is our contention that the May 20 order of the district court is properly before this Court for review on two distinct, independent grounds. First, we believe the order of the district court is appealable under 28

U.S.C. 1291, and since an appeal had been taken to the court of appeals, this Court has jurisdiction under 28 U.S.C. 1254(1) to review the order before judgment in the court of appeals. Second, this Court also has jurisdiction under 28 U.S.C. 1254(1) to consider the President's petition for a writ of mandamus, which was pending in the court of appeals, and is fairly comprehended by the questions presented in the petition and cross-petition for certiorari.

In any event, the Court has adequate jurisdiction to resolve the issues presented under the All Writs Act, 28 U.S.C. 1651, which empowers this Court to issue common law writs of certiorari or writs of mandamus to review directly decisions of district courts in extraordinary cases.

ARGUMENT

I

THE ORDER OF THE DISTRICT COURT REQUIRING THE PRESIDENT TO PRODUCE EVIDENCE FOR IN CAMERA INSPECTION IS APPEALABLE

Ordinarily, of course, an order like the one presented for review—requiring the production of evidence pursuant to a subpoena *duces tecum* and denying a motion to quash—is not considered a final order appealable under 28 U.S.C. 1291. In such cases, the person to whom the subpoena is directed "must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey." *United States* v. *Ryan,* 402 U.S. 530, 532. See also *Cobbledick* v. *United States,* 309 U.S. 323; *Alexander* v. *United*

States, 201 U.S. 117. As this Court held in *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546, however, Section 1291 must be given a "practical rather than a technical construction." The compelling circumstances of this case—where the person to whom the subpoena is directed is the President of the United States—require an exception to this judicially constructed rule that normally governs the timeliness of an appeal from the enforcement of a subpoena. See *Nixon* v. *Sirica,* 487 F. 2d 700, 707 n. 21 (D.C. Cir. 1973) (*en banc*).

Even though an order enforcing a subpoena *duces tecum* issued to a third-party witness in a criminal proceeding effectively determines that party's interests in a matter collateral to the prosecution and, as a practical matter, is a final order, the interests in the orderly administration of justice have led this Court to hold that such an order is not appealable. There can be no question that if such orders were routinely appealable, there would be interminable delays in nearly every criminal case while third-party witnesses litigated their obligation to provide evidence. Thus, "the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal." *United States* v. *Ryan, supra,* 402 U.S. at 533. In the circumstances of this case, however, that "choice" not only would be wholly inappropriate, but

550-988—74——2

most likely would defeat the very purpose of *Ryan*—expedition of the criminal process. There is certainly no statutory obstacle to treating the ordinary timeliness rule as inapplicable here, since as this Court reaffirmed quite recently, the final order rule of 28 U.S.C. 1291 "does not limit appellate review to 'those final judgments which terminate an action.'" *Eisen* v. *Carlisle & Jacquelin*, —— U.S. —— (42 U.S.L.W. 4804, 4808, May 28, 1974), citing *Cohen* v. *Beneficial Loan Corp., supra,* 337 U.S. at 545.

Although it is an open question whether the President is legally and constitutionally subject to citation for civil or criminal contempt of court,[1] no one would question that such a course would be radical and, even if constitutionally feasible, should be avoided if at all possible while still maintaining the integrity of the courts and the administration of justice. This was the crucial factor in leading the Court of Appeals for the District of Columbia Circuit to state that despite *Ryan*, an order requiring the President to submit evidence for *in camera* inspection under a subpoena is appealable. "In the case of the President, contempt of a judicial order—even for the purpose of enabling a constitutional test of the order—would be a course unseemly at best." *Nixon* v. *Sirica, supra,* 487 F.

[1] But see *Land* v. *Dollar*, 190 F. 2d 623 (D.C. Cir. 1951), vacated as moot, 344 U.S. 806 (cabinet officers held in contempt for refusing on directions of the President to obey court order); *United States* v. *Isaacs and Kerner*, 493 F. 2d 1194 (7th Cir. 1974), cert. denied, — U.S. — (June 17, 1974) (impeachable officer liable to criminal conviction prior to impeachment and removal).

2d at 707 n.21.[2] The courts simply as a matter of comity between the Branches should not place the President in the position of having to suffer a contempt citation—itself an inevitable subject of consitutional litigation—in order to secure review of such an order directed to him. Nor, as a matter of discretion, should they invite a situation where they will be called upon to decide whether the President in fact can be held in contempt if he declines to obey the lower court order.

It goes without saying that this is one of that "small class" of cases where the issues finally determined by the district court are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Industrial Loan Corp., supra,* 337 U.S. at 546. Unlike the ordinary litigation concerning a subpoena *duces tecum,* the basic constitutional issues involved in this case have not been decided definitively by this Court. Since the evidence sought in the subpoena, as we demonstrate in Parts III(B) and V of our Brief, is highly material to the prosecution in *United States* v. *Mitchell, et al.,* these issues require prompt resolution by this Court. Finally, it would be hard to envision a case which belongs to a smaller class—a

[2] In an *en banc* order entered on June 18, 1974, the court of appeals held that a district court order, entered in the interim, overruling a Presidential claim of executive privilege for a specific subpoenaed item is appealable, and ordered the President's mandamus petition, seeking review of that order, docketed as an appeal. *Nixon* v. *Sirica* (D.C. Cir. No. 74-1618).

case where a subpoena has issued to *and* compliance ordered against the President.

The rule established by *Ryan* and *Cobbledick*, every bit as much as the *Cohen* rule or the recent holding in *Eisen*, reflects an "evaluation of the competing considerations underlying all questions of finality—'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'" *Eisen* v. *Carlisle and Jacquelin, supra*, 42 U.S.L.W. at 4808. The "evaluation" here shows that this case is clearly distinguishable even from the cases where third-party witnesses are ordered to produce evidence and mandates clearly that the order of the district court be construed as a final order appealable under 28 U.S.C. 1291.

II

THIS COURT HAS JURISDICTION TO ENTERTAIN AND DECIDE THE PETITION FOR MANDAMUS TRANSMITTED BY THE COURT OF APPEALS TO THIS COURT

By its order of June 15, 1974, this Court also directed the parties to address the question whether it has "jurisdiction" to entertain and decide the petition for a writ of mandamus transmitted by the court of appeals as part of the record on certiorari. In our view, this Court unquestionably has such jurisdiction.

A. REVIEW OF THE MANDAMUS PETITION IS AUTHORIZED BY 28 U.S.C. 1254(1)

We begin by noting that under the All Writs Act, 28 U.S.C. 1651(a), the court of appeals (like this

Court) has jurisdiction to issue "all writs necessary or appropriate in aid of" the court's jurisdiction and "agreeable to the usages and principles of law." In view of the extraordinary nature of proceedings seeking to order the President to comply with a subpoena *duces tecum*, the court of appeals held in *Nixon* v. *Sirica, supra*, 487 F. 2d at 706–07, that the normal predicate for seeking review of such an order—suffering a contempt adjudication—was inappropriate, and that, to the extent an appeal could not be supported, immediate exercise of the court's "review power under the All Writs Act" was warranted, "particularly in light of the great public interest in prompt resolution of the issues that his petition presents." 487 F. 2d at 707 (footnotes omitted). That ruling, based on the court's review of the numerous decisions of this Court dealing with mandamus, was unquestionably within the Court's statutory power and reflects a legitimate exercise of discretion. See generally *Will* v. *United States*, 389 U.S. 90; *Schlagenhauf* v. *Holder*, 379 U.S. 104; *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21; *United States* v. *United States District Court*, 444 F. 2d 651, 655–56 (6th Cir. 1971), aff'd, 407 U.S. 297, 301 n.3. In seeking review of the May 20, 1974 order by mandamus, the President was following the course marked out by the court of appeals, and that court had statutory jurisdiction to entertain the petition.

This Court's jurisdiction to review that mandamus case on certiorari is similarly clear. Under 28 U.S.C.

1254(1) the Court has jurisdiction to review "cases in the court of appeals":

> By writ of certiorari granted upon the petition of *any* party to *any* civil or criminal case, before or after rendition of judgment or decree. (Emphasis added.)

This congressional vesting of jurisdiction under Article III of the Constitution is plainly sufficient. We see no room to doubt that a duly docketed petition for mandamus comes within the scope of "any case" pending in the court of appeals. As the Court stated in *Gay* v. *Ruff*, 292 U.S. 25, 30, the power given to review cases before judgment in the court of appeals is "unaffected by the condition of the case as it exists in the circuit court of appeals; * * * the sole essential of this Court's jurisdiction to review is that there be a case pending in the circuit court of appeals." There is no reason to believe that when Congress used the term "any civil or criminal case" in Section 1254(1) it intended to limit the Court's power to reviewing district court cases that were brought to the court of appeals by way of appeal and to exclude cases involving mandamus applications to review those cases. The language of the statute covers mandamus cases, and the policy reasons for authorizing expedited review apply with at least equal force to such applications. See Sup. Ct. Rule 20.

Although issue had not been joined in the court of appeals by a request for a response to the mandamus petition under Rule 21(b), Federal Rules of Appellate Procedure, the certiorari petitions were timely. Section 2101(e) provides that an application for certiorari before judgment has been rendered by a court of appeals may be made "at any time" before judgment, and the cases in which this expedited procedure has been followed typically are in the most preliminary stages of docketing when review is applied for and granted by this Court.[3]

As we pointed out in our petition for a writ of certiorari, the statutory authority to grant review before judgment on the application of "any party" to the case in the court of appeals has been used on prior occasions to bring a case up for review on the application of the party that had prevailed in the district court, as in the present case. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579; *United States* v. *United Mine Workers*, 330 U.S. 258, 269; *United States* v. *Bankers Trust Co.*, 294 U.S. 240.[4]

B. THE COURT HAS APPELLATE JURISDICTION UNDER ARTICLE III

Nor is there any doubt that this statutory authority is a valid exercise of the Congressional power to regulate the *appellate* jurisdiction of this Court under Article III of the Constitution. Although a petition for a writ of mandamus—whether applied for in the court of appeals or in this Court—is in a sense a new proceeding, it has been settled since *Marbury* v. *Madison*, 1 Cranch 137, that mandamus to review the action of an inferior court is an exercise of the Court's *appellate* jurisdiction. In that case, Chief Justice Marshall stated, as the "essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not

---

[3] See Stern & Gressman, *Supreme Court Practice* § 2.3, at 28 (4th ed. 1969).

[4] The application of this statute to a petition by the party prevailing in the district court was demonstrated in the government's petition in *Bankers Trust*. No. 471, O.T. 1934, at 11–16.

create that cause." 1 Cranch at 175. As Justice Harlan explained in his lengthy concurring opinion, discussing similar issues, in *Chandler* v. *Judicial Council of the Tenth Circuit,* 398 U.S. 74, 96:

> Beyond cavil, the issuance of a writ of mandamus to an inferior *court* is an exercise of appellate jurisdiction. In re Winn, 213 U.S. 458, 465–466. (Emphasis in original.)

For this reason, the Court regularly has entertained and decided "original" petitions for writs of mandamus directed to district courts in the exercise of what is, under Article III, the Court's appellate jurisdiction. See, *e.g., McCullough* v. *Cosgrave,* 309 U.S. 634 (per curiam); *Ex parte Peru,* 318 U.S. 578, 582–83; *Ex parte United States,* 287 U.S. 241, 245–49. Indeed, Rule 30 of this Court's Rules expressly recognizes the Court's power to issue extraordinary writs like mandamus, which necessarily involve a valid exercise of appellate jurisdiction when review of a lower court's decision is sought thereby. It follows, *a fortiori,* that this Court has constitutional jurisdiction to exercise the authority conferred by Section 1254(1) to consider, before judgment, the mandamus case filed in the court of appeals, since the object of the Court's review is identical: to set aside, modify or leave undisturbed the district court's order. See 28 U.S.C. 2106.[5]

[5] Whether Section 1254(1) applies to petitions filed in courts of appeals for direct review of administrative agency decisions and whether review of such petitions before judgment of the court of appeals would come within this Court's appellate jurisdiction under Article III are distinct questions that need not be addressed in this case, where the Court is being called upon to review an order of a lower federal court. See generally Stern & Gressman, *supra,* § 2.3, at 29–30.

C. ALTERNATIVELY, JURISDICTION CAN BE RESTED ON THE ALL WRITS ACT, 28 U.S.C. 1651(a)

Finally, we note that, if for some reason the Court concludes that the mandamus petition was not properly a "case" pending "in" the court of appeals, so as to fit within the statutory certiorari-before-judgment provision in Section 1254(1), this Court would still have ample jurisdiction to entertain and decide the issues raised and briefed by the parties. All of the same issues, of course, are raised by the President's duly docketed appeal to the court of appeals. In addition, even if there is some defect with that appeal (but see part I, above), the Court still has an adequate basis for jurisdiction. As expressly recognized by this Court's Rule 31(2), the All Writs Act, 28 U.S.C. 1651(a), authorizes the Court to issue extraordinary writs like the "common law writ of certiorari" to a lower court, and this power has been used when cases were found not to be pending "in" a court of appeals. See, *e.g., House* v. *Mayo,* 324 U.S. 42, 44; *Matter of 620 Church St. Building Corp.,* 299 U.S. 24, 26. See also *United States Alkali Export Ass'n* v. *United States,* 325 U.S. 196; *DeBeers Consolidated Mines Ltd.* v. *United States,* 325 U.S. 212. In addition, the Court could treat the President's cross-petition for certiorari before judgment as an application for an "original" writ of mandamus to review the district court's order directly. See *McCullough* v. *Cosgrave, supra; Ex parte Peru, supra; Ex parte United States, supra.* Since review of an order of a district court is sought, such review comes within the "appellate" jurisdiction under Article III. The circumstances of

the present case, as measured by the criteria followed by the Court in other cases, certainly show that the use of an extraordinary writ, if necessary, is warranted to resolve promptly the major constitutional issues raised by this important litigation.

CONCLUSION

The Court has jurisdiction over the issues raised in the petitions for writs of certiorari before judgment, and the judgment of the district court should be affirmed on the merits for the reasons set forth in our main brief.

Respectfully submitted.

LEON JAWORSKI,
Special Prosecutor.
PHILIP A. LACOVARA,
Counsel to the Special Prosecutor.
Attorneys for the United States.

JUNE 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974

Supreme Court, U. S.
FILED
JUN 21 1974
..., JR., CLERK

Nos. 73-1766 and 73-1834

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES ET AL., RESPONDENTS

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, CROSS-PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRITS OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT, CROSS-PETITIONER RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES

JAMES D. ST. CLAIR,
MICHAEL A. STERLACCI,
JEROME J. MURPHY,
LOREN A. SMITH,
JAMES R. PROCHNOW,
EUGENE R. SULLIVAN,
JEAN A. STAUDT,
THEODORE J. GARRISH,
JAMES J. TANSEY,
LARRY G. GUTTERRIDGE,
Attorneys for the President,
The White House,
Washington, D.C. 20500,
Telephone Number: 456-1414.

INDEX

	Page
Opinions and orders below	1, 2
Jurisdiction	2
Questions presented	2, 3
Constitutional provisions, statutes, rules and regulations involved	4, 5
Statement	5
Introduction	12
Summary of argument	16
Argument:	
I. This court may review the May 20, 1974 order of the district court by either one of two alternative methods	18
A. By appeal pursuant to 28 U.S.C. 1291	18
B. By entertaining and deciding a petition for writ of mandamus transmitted by a court of appeals	24
II. The court lacks jurisdiction over an internal dispute of a co-equal branch	27
III. This intra-branch dispute does not present a justiciable case or controversy within the meaning of Article III, Sec. 2 of the Constitution	44
IV. A presidential assertion of privilege is not reviewable by the Court	48
A. The separation of powers doctrine precludes judicial review of the use of executive privilege by a President	48

Argument—Continued Page

B. The right of privacy and freedom of expression support the absolute confidentiality of presidential communications with his advisers 69

C. The judicial branch cannot compel production of privileged material from the President 72

D. An allegation of criminal activity does not overcome the assertion of presidential privilege 82

V. The Special Prosecutor has failed to demonstrate a unique and compelling need required under *Nixon* v. *Sirica* to overcome a valid claim of presidential privilege 86

A. Privilege generally 86

B. Applicability of executive privilege 88

C. Balancing test 93

VI. An incumbent President cannot lawfully be charged with a crime by a grand jury 95

A. The President cannot be indicted while he is serving as President 95

B. The grand jury action of naming the President as an unindicted co-conspirator is a nullity 107

C. Even if it were permissible, the naming of an incumbent President as an unindicted co-conspirator does not constitute a *prima facie* showing of criminal activity 115

Argument—Continued Page

VII. The Special Prosecutor failed to satisfy the requirements for a Rule 17(C) subpoena 122

A. The Special Prosecutor has failed to demonstrate that the materials sought were relevant and evidentiary 122

B. The President should not be judged as a "typical" third party 131

Conclusion 133

TABLE OF CITATIONS

Cases:

Adjmi v. *United States*, 343 F. 2d 164 (5th Cir. 1965) 119

Alexander v. *United States*, 201 U.S. 117 (1906) 23

Amsler v. *United States*, 381 F. 2d 37 (9th Cir. 1967) 132

Anderson v. *Dunn*, 6 Wheat (19 U.S.) 204 (1821) 47

Application of Magnus 299 F. 2d 335 (2d Cir. 1961), *cert. denied*, 370 U.S. 918 (1962) 131

Baker v. *Carr*, 369 U.S. 186 (1962) 17, 45, 46

Barr v. *Matteo*, 360 U.S. 564 (1959) 53

Bell v. *Benson*, 402 U.S. 535 (1971) 111

Black v. *United States*, 309 F. 2d 331 (8th Cir. 1962), *cert. denied*, 372 U.S. 934 (1963) 119

Board of Regents of State College v. *Roth*, 408 U.S. 564 (1972) 111

Bowman Dairy Co. v. *United States*, 341 U.S. 214 (1951) 123, 127

Boyd v. *United States*, 116 U.S. 616 (1886) 113

Branzburg v. *Hayes*, 408 U.S. 665 (1972) 77

Brady v. *Maryland*, 373 U.S. 83 (1963) 29, 61

Brinegar v. *United States*, 338 U.S. 160 (1949) 116

Cases—Continued

	Page
Carl Zeiss Stiftung v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966) *aff'd on the opinion below*, 384 F. 2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967)	87
Carroll v. *United States*, 354 U.S. 394 (1957)	18
Caswell v. *Manhattan Fire and Marine Insurance Co.*, 399 F. 2d 417 (5th Cir. 1968)	22
Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)	18, 20, 21
Coleman v. *Miller*, 307 U.S. 433 (1939)	45
Committee for Nuclear Responsibility v. *Seaborg*, 463 F. 2d 788 (D.C. Cir. 1971)	48, 94
Confiscation Cases, 7 Wall (74 U.S.) 454 (1869)	39
Continental Oil Co. v. *United States*, 330 F. 2d 347 (9th Cir. 1964)	87
District of Columbia v. *Buckley*, 128 F. 2d 17 (D.C. Cir. 1942)	39
Dombrowski v. *Pfister*, 380 U.S. 479 (1965)	71
Eastern Railroad Presidents Conference v. *Noerr Motor Freight Inc.*, 365 U.S. 127 (1961)	70
Eisen v. *Carlisle & Jacquelin*, U.S. (42 U.S. L. W. 4804, May 28, 1974)	20, 21
Environmental Protection Agency v. *Mink*, 410 U.S. 73 (1973)	48
Estes v. *Texas*, 381 U.S. 532 (1965)	110
Ex Parte Grossman, 267 U.S. 87 (1925)	48, 86
Ex Parte Peru, 318 U.S. 578 (1943)	25
Federal Communications Commission v. *Schreiber*, 381 U.S. 279 (1965)	121
Flast v. *Cohen*, 392 U.S. 83 (1968)	35, 45
French v. *Weeks*, 259 U.S. 326 (1922)	29
Fuentes v. *Shevin*, 407 U.S. 67 (1973)	111
Gillespie v. *United States Steel Corp.*, 379 U.S. 148 (1964)	19, 23

Cases—Continued

	Page
Gilligan v. *Morgan*, 413 U.S. 1 (1973)	47, 48
Goldberg v. *Kelly*, 397 U.S. 254 (1970)	111
Greene v. *McElroy*, 360 U.S. 474 (1959)	111
Griswold v. *Connecticut*, 381 U.S. 479 (1965)	69
Home Building & Loan Association v. *Blaisdell*, 290 U.S. 398 (1934)	105
Humphrey's Executor v. *United States*, 295 U.S. 602 (1935)	34, 36, 37, 38, 74, 80
Industrial Addition Association v. *I.R.S.*, 323 U.S. 310 (1945)	44
Inland Waterways Corp. v. *Young*, 309 U.S. 517 (1940)	50, 59
In Re Grand Jury, January, 1969, 315 F. Supp. 662 (D. Md. 1970)	39
In Re Grand Jury Subpoena Duces Tecum, 203 F. Supp. 575 (S.D.N.Y. 1961)	91
In Re Magnus, Mabee & Reynard, Inc., 311 F. 2d 12 (2nd Cir.), *cert. denied*, 373 U.S. 902 (1962)	132
In Re Murchison, 349 U.S. 133 (1955)	110
In Re Report and Recommendation of the June 5, 1972 Grand Jury Concerning Transmission of Evidence To The House of Representatives, 370 F. Supp. 1219 (D.D.C. 1974)	7, 109
Kaiser Aluminum & Chemical Corp. v. *United States*, 157 F. Supp. 939 (Ct. Cl. 1958)	83, 87
Kendall v. *United States*, ex. rel. *Stokes*, 12 Peters (37 U.S.) 524 (1838)	73, 84, 104
Kilbourn v. *Thompson*, 103 U.S. 168 (1880)	37, 49, 50, 73
LaBuy v. *Howes Leather Co.*, 352 U.S. 249 (1957)	25
Lilienthal's Tobacco v. *United States*, 97 U.S. 237 (1877)	118

Cases—Continued

	Page
Locke v. *United States*, 7 Cranch (11 U.S.) 339 (1813)	116
Mackey v. *United States*, 351 F. 2d 794 (D.C. Cir. 1965)	87
Magida v. *Continental Can Co.*, 12 F.R.D. 400 (S.D.N.Y. 1951)	88
Mapp v. *Ohio*, 367 U.S. 643 (1961)	113
Marbury v. *Madison*, 1 Cranch (5 U.S.) 137 (1803)	29, 39, 40, 45, 74, 84, 86, 104, 106
Marshall v. *Gordon*, 243 U.S. 521 (1917)	34
Mississippi v. *Johnson*, 4 Wall (71 U.S.) 475 (1867)	81, 86
Mitchell v. *Maurer*, 293 U.S. 237 (1934)	44
Monaco v. *Mississippi*, 292 U.S. 313 (1934)	34
Myers v. *United States*, 272 U.S. 52 (1926)	73
National Association for the Advancement of Colored People v. *Alabama*, 357 U.S. 449 (1958)	71
National Insurance Co. v. *Tidewater Co.*, 337 U.S. 582 (1949)	34
National Treasury Employees Union v. *Nixon*, 492 F. 2d 587 (D.C. Cir. 1974)	81
New York Times v. *United States*, 403 U.S. 713 (1971)	47, 59, 66, 67
Nichols v. *United States*, 460 F. 2d 671 (10th Cir. 1972), *cert. denied*, 409 U.S. 966 (1972)	65
Nixon v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973)	passim
North Dakota State Board of Pharmacy v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973)	21
Northern Securities Co. v. *United States*, 193 U.S. 197 (1904)	134
O'Donoghue v. *United States*, 289 U.S. 516 (1933)	34

Cases—Continued

	Page
Oklahoma Press Publishing Co. v. *Walling*, 327 U.S. 186 (1946)	132
40 Op. Att'y. Gen. 45 (1941)	58
25 Op. Att'y. Gen. 326 (1905)	58
20 Op. Att'y. Gen. 557 (1893)	58
11 Op. Att'y. Gen. 137 (1865)	58
38 Op. Att'y. Gen. 457 (1936)	29
Peters v. *Hobby*, 349 U.S. 331 (1955)	112
Poe v. *Ullman*, 367 U.S. 497 (1961)	45
Powell v. *McCormick*, 395 U.S. 486 (1969)	48, 105
Pugach v. *Klein*, 193 F. Supp. 630 (S.D.N.Y. 1961)	39
Runkle v. *United States* 122 U.S. 543 (1887)	29
Schwimmer v. *United States*, 232 F. 2d 855 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956)	91, 92
Senate Select Committee on Presidential Campaign Activities v. *Richard M. Nixon*, Slip Op No. 74–1258 (D.C. Cir. May 23, 1974)	56, 57, 95
Sheppard v. *Maxwell*, 384 U.S. 333 (1966)	110
Silverthorne Lumber Co. v. *United States*, 251 U.S. 385 (1920)	113
Sinking Fund Cases, 99 U.S. 700 (1879)	33
Smith v. *United States*, 375 F. 2d 243 (5th Cir. 1967)	39
Sniadach v. *Family Finance Corp.*, 395 U.S. 337 (1969)	111
Soucie v. *David*, 448 F. 2d 1067 (D.C. Cir. 1971)	60
Springer v. *Philippine Islands*, 277 U.S. 189 (1927)	35, 36
State of Michigan v. Tucker, — U.S. — (42 U.S.L.W. 4887, June 10, 1974)	68
Totten v. *United States*, 92 U.S. 105 (1875)	87
United States v. *Agnew*, 165 U.S. 36 (1897)	120

Cases—Continued

	Page
United States v. *Aldridge*, 484 F. 2d 655 (7th Cir. 1973)	83
United States v. *Bearden*, 423 F. 2d 805 (5th Cir.), *cert denied*, 400 U.S. 836 (1970)	125
United States v. *Brockington*, 21 F.R.D. 104 (E.D. Va. 1957)	130
United States v. *Burr*, 25 F. Cas. 30 No. 14692d (C.C.D. Va. 1807)	51, 77
United States v. *Burr*, 25 F. Cas. 187, No. 14694 (C.C.D. VA. 1807)	29, 51, 77, 80, 93
United States v. *Carter*, 15 F.R.D. 367 D.D.C. 1954	130
United States v. *Conder*, 423 F. 2d 904 (6th Cir. 1970), *cert. denied*, 400 U.S. 958 (1970)	127
United States v. *Cox*, 342 F. 2d 167 (5th Cir. (1965), *cert. denied* 381 U.S. 935 (1965)	39, 40, 41, 93
United States v. *Cummings*, 468 F. 2d 274 (9th Cir. 1972)	118
United States v. *Duncan*, 22 F.R.D. 295 (S.D.N.Y. 1958)	125
United States v. *John Ehrlichman et al.*, Cr. No. 74–116 (D.D.C. 1974)	8
United States v. *Fletcher*, 148 U.S. 84 (1893)	29
United States v. *Frank*, 23 F.R.D. 145 (D.D.C. 1959)	127
United States v. *Garrison*, 168 F. Supp. 622 (E.D. Wis. 1958)	125
United States v. *Gross*, 24 F.R.D. 138 (S.D.N.Y. 1959)	125, 127
United States v. *Hiss*, 9 F.R.D. 515 (S.D.N.Y. 1949)	130
United States v. *Interstate Commerce Comm.* 337 U.S. 426 (1949)	37

Cases—Continued

	Page
United States v. *Iozia*, 13 F.R.D. 335 (S.D.N.Y. 1952)	124, 125, 126, 129, 131
United States v. *Jacobs*, 322 F. Supp. 1299 (C.D. Cal. 1971)	88
United States v. *Judson*, 322 F. 2d 460 (9th Cir. 1963)	88
United States v. *Klein*, 13 Wall (80 U.S. 128 (1872)	33
United States v. *Marchisio*, 344 F 2d 653 (2d Cir. 1965)	128, 129
United States v. *Maryland and Virginia Milk Producers, Inc.* 9 F.R.D. 509 (D.C.C. 1949)	128
United States v. *Midwest Oil*, 236 U.S. 459 (1915)	50, 59
United States v. *Mitchell*, Cr. No. 74–110 (D.D.C. 1974)	6, 21, 51, 122
United States v. *Murray*, 297 F. 2d 812 (2d Cir. 1962)	129, 130
United States v. *Palermo*, 21 F.R.D. 11 (S.D. N.Y. 1957)	125, 129
United States v. *Reynolds*, 345 U.S. 1 (1953)	87, 94
United States v. *Ryan*, 402 U.S. 530 (1971)	18, 21
United States v. *Senior*, 274 F. 2d 613 (7th Cir. 1960)	119
United States v. *Sutton*, 312 F. Supp. 969 (D. Ariz. 1970), *aff'd* 446 F2d 916 (9th Cir. 1971), *cert. denied*, 404 U.S. 1025 (1972)	118, 119
United States v. *Ventresca*, 380 U.S. 102 (1965)	117
United States v. *White*, 322 U.S. 694 (1944)	88
United States v. *Wiggins*, 14 Peters (39 U.S.) 334 (1840)	118
United States v. *Winkler*, 17 F.R.D. 213 (D. R.I. 1955)	125, 126, 130
Wave v. *Hylton*, 3 Dall (3 U.S.) 199 (1796)	47
Weeks v. *United States*, 232 U.S. 383 (1914)	113

Cases—Continued Page
Will v. *United States*, 389 U.S. 90 (1967)..... 26
Williams v. *United States*, 1 How. (14 U.S.). 290 (1843)..... 29
Wisconsin v. *Constantineau*, 400 U.S. 433 (1971)..... 111
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952)..... 29, 106
Constitution, Statutes, Rules, and Regulations:
Article I, section 2, clause 2..... 4, 139
Article I, section 3, clause 7..... 4, 98, 99
Article I, section 5, clause 2..... 4, 141
Article I, section 6..... 4, 142
Article II, section 1..... 4, 46, 133, 142
Article II, section 1, clause 1..... 4, 49, 50, 52
Article II, section 1, clause 8..... 4, 40
Article II, section 2, clause 1.. 4, 69, 85, 96, 97, 144
Article II, section 2, clause 7..... 4, 98, 144
Article II, section 3..... 4, 121, 145
Article II, section 3, clause 1..... 4, 97
Article II, section 3, clause 7..... 4
Article III, section 2..... 4, 44, 45, 145
18 U.S.C. 371; 62 Stat. 701..... 4, 6, 146
18 U.S.C. 1001; 62 Stat. 749..... 4, 6, 147
18 U.S.C. 1503: 82 Stat. 1115..... 4, 6, 147
18 U.S.C. 1621; 78 Stat. 995..... 4, 6, 148
18 U.S.C. 1623; 84 Stat. 932..... 4, 6, 149
Jencks Act, 18 U.S.C. 3500; 94 Stat. 926.. 4, 61, 150
18 U.S.C. 3731; 74 Stat. 1890..... 4, 21, 151
28 U.S.C. 44; 82 Stat. 183..... 4, 97, 152
28 U.S.C 133; 85 Stat. 742..... 4, 97, 153
28 U.S.C. 1254; 62 Stat. 928..... 2, 4, 21, 153
28 U.S.C. 1291; 72 Stat. 348..... 4, 16, 18, 20, 21, 23, 25, 154
28 U.S.C. 1651; 63 Stat. 102.. 4, 16, 23, 25, 27, 154

Statutes and Regulations—Continued Page
Presidential Libraries Act, 44 U.S.C. 2107; 82 Stat. 1288..... 4, 65, 154
44 U.S.C. 2108(c); 82 Stat. 1289..... 4, 65, 155
Rule 26, Federal Rules of Civil Procedure... 4, 128, 156
Rule 6(e); Federal Rules of Criminal Procedure..... 4, 8, 11, 157
Rule 17(c), Federal Rules of Criminal Procedure..... 3, 4, 7, 10, 17, 86, 122, 123, 125, 126, 129, 130, 131, 157
Department of Justice Order No. 551–73 (November 2, 1973), 38 Fed. Reg. 30, 738, adding 28 C.F.R. ss 0.37, 0.38, and Appendix to Subpart G–1..... 4, 41, 42, 43, 158
Department of Justice Order No. 554–73 (November 19, 1973), 38 Fed. Reg. 32, 805, amending 28 C.F.R. Appendix to Subpart G–1..... 4, 164
Other Authorities:
Agreement between Mrs. Jacqueline B. Kennedy and the United States, February 25, 1965..... 66
Andrews, *The Works of James Wilson* (1896).. 33
3 *Annals of Congress* 493..... 55
Aristotle's *Politics* (Jowett, B. transl. 1943).. 30
Berger, R., *Executive Privilege: A Constitutional Myth* (Harvard Univ. Press 1974)..... 79
Berger, R., *Executive Privilege* v. *Congressional Inquiry*, 12 U.C.L.A. Rev. 1043 (1965)..... 79
Beveridge, A., *The Life of John Marshall* (N.Y. 1919)..... 79
Bickel, A., *The Tapes, Cox, Nixon*, The New Republic (September 29, 1973)..... 28

Other Authorities—Continued

Brennan, *Working At Justice*, in *An Autobiography Of The Supreme Court* (Westin ed. 1963) 60
Bryce, J., *The American Commonwealth* (Macmillan Co. 1889) 104
Cohen, M. R., *The Supreme Court in United States History* (1946) 75
Committee on Armed Services, United States Senate *Military Cold War Escalation And Speech Review Policies*, 87th Cong., 2d Sess. (1962) 62
17 *Congressional Record*, 2332, 44th Cong., 2d Sess. (1877) 58
108 *Congressional Record*, 3626, 87th Cong., 2d Sess. (1962) 61
116 *Congressional Record*, 37652, 91st Cong., 2d Sess. (Nov. 17, 1970) 61
118 *Congressional Record*, 766, 92nd Cong., 2d Sess. (Oct. 4, 1972) 61
119 *Congressional Record*, 2244, 93rd Cong., 1st Sess. (March 28, 1973) 58
120 *Congressional Record*, 4973, 93rd Cong., 2d Sess. (June 10, 1974) 62, 63
Constitution of Alaska (1959) 32
Constitution of Hawaii (1959) 32
Cooper, T., *Account of the Trial of Thomas Cooper* (1800) 80
Corwin, E., *Introduction to Congressional Research Service, The Constitution of the United States of America* (1974) 50, 51, 96
Devitt & *Blackmar, Federal Practice and Instructions*, (1970) 119

Other Authorities—Continued

Dodd, W., *State Government*, 58 (2d Ed. 1928) 32
Farrand, M., *The Records of the Federal Convention of 1787*, (rev. ed. 1966) 32, 33, 52, 63, 85, 99, 100, 102, 103
The Federalist, No. 47 (J. Madison) 32
The Federalist, No. 48 (J. Madison) 35
The Federalist, No. 65 (A. Hamilton) 100
The Federalist, No. 69 (A. Hamilton) 52, 100
Ford, P., *Writings of Thomas Jefferson* (N.Y. 1893) 55, 78
Forkosch, *Constitutional Law* (1963) 135
Forkosch, *Separation of Powers* 41 U. Col. L. Rev., 529 (1969) 30
Frankfurter, F., *Mr. Justice Roberts*, 104 U. Pa. L. Rev. 311 (1955) 60
Hughes, *The Living Presidency* (1973) 63
Letter from Acting Attorney General Bork to Special Prosecutor Leon Jaworski, November 21, 1973 ..... 42, 165
Letter from President Dwight D. Eisenhower to the Administrator of General Services, April 13, 1960 ..... 65, 66
Letter from President Lyndon B. Johnson to the Administrator of General Services, August 13, 1965 66
Letter from President Richard Nixon to Senator Sam Ervin, July 6, 1973 64
Locke, J., *An Essay Concerning the True Original Extent and End of Civil Government* in *Of Civil Government And Letter On Toleration* (J. W. Gough ed. 1947) 31
Madison, J., *Notes* (1840) 63

Other Authorities—Continued

	Page
Miller & Sastri, *Secrecy and The Supreme Court: On The Need For Piercing The Red Velour Curtain*, 22 Buff. L. Rev. 799 (1973)	60
Montesquieu, *The Spirit of the Laws* (38 Great Books of the Western World, 1900)	30, 31
New York Times, "Truman Memorandum," Sept. 3, 1948, at 5	55, 58
New York Times, March 12, 1974, p. 1	114
New York Times, January 6, 1974, pp. 1, 40	113
Public Papers of The Presidents Of The United States: Dwight D. Eisenhower (Government Printing Office 1959)	65
Rhodes, I., *What Really Happened to the Jefferson Subpoenas*, 60 A.B.A.J. 52 (1974)	79
Richardson, *Messages And Papers of Presidents*	58
Rossiter, C., *The American Presidency* (N.Y. 1956)	52, 80
Story, *The Constitution* (4th Ed.)	35
Truman, H., *Memoirs* (Kansas City ed. 1955)	64
Warren, C., *The Supreme Court in United States History* (1922)	75
9 *Wigmore, On Evidence* (3rd ed. 1940)	120, 121

In the Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-1766 and 73-1834

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, ET AL., RESPONDENTS

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, CROSS-PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRITS OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT, CROSS-PETITIONER RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES

OPINIONS BELOW

The opinion and order of the district court (P.A. 15)[1] has not yet been reported. The United States Court of Appeals for the District of Columbia circuit

[1] The reference "P.A." is to the Appendix to the Petition in No. 73-1766. The reference "J.A." is to the unsealed joint appendix filed in this case.

has neither considered nor rendered an opinion in this case.

JURISDICTION

The opinion and order of the district court was entered on May 20, 1974 (P.A. 15). On May 24, 1974, the President filed both a timely notice of appeal in the district court and a petition for a writ of mandamus in the United States Court of Appeals for the District of Columbia Circuit. Upon the filing of the appeal, the order of the district court was stayed. On May 24, 1974, appellee, United States of America, filed in this Court a petition for writ of certiorari before judgment, which was granted on May 31, 1974. (No. 73–1766) On June 6, 1974, the President filed a cross-petition for writ of certiorari before judgment which was granted on June 15, 1974. (No. 73–1834) At that time, both cases were consolidated. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The district court, relying in part on *Nixon* v. *Sirica*, 487 F.2d 700 (D.C. Cir. 1973), denied the motions filed by the President to quash a trial subpoena *duces tecum* directed to the President for presidential materials, and to expunge any finding by the grand jury that he was an unindicted co-conspirator in a criminal proceeding. The questions presented here for review are:

1. Whether the Court has jurisdiction to review the order of the district court on the grounds that either:

   a. the district court's order of May 20, 1974, was an appealable order, or
   b. the Court has jurisdiction to entertain and decide a petition for mandamus transmitted by a court of appeals to this Court.
2. Whether the Judiciary has jurisdiction to intervene in an internal dispute of a co-equal branch.
3. Whether a court can substitute its judgment for that of the President, when he exercises his discretion, in determining that disclosures of presidential records would not serve the public interest.
4. Whether a court has authority to enforce a subpoena against a President of the United States by ordering him to produce for *in camera* inspection, records demanded by a subpoena when the President has interposed a valid and formal claim of privilege.
5. Whether, under the Constitution, a grand jury has the authority to charge an incumbent President of the United States as an unindicted co-conspirator in a criminal proceeding.
6. Whether the Special Prosecutor has made the necessary showing required to obtain materials under Rule 17(c), Federal Rules of Criminal Procedure, and *Nixon* v. *Sirica*, 487 F.2d 700 (D.C. Cir. 1973).

551-585—74——2

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS

The constitutional provisions, statutes, rules, and regulations involved are set forth in the Appendix, *infra*, pp. 138–164, are:

Constitution of the United States:

Article I, section 2, clause 2.
Article I, section 3, clause 7.
Article I, section 5, clause 2.
Article I, section 6.
Article II section 1.
Article II, section 1, clause 1.
Article II, section 1, clause 8.
Article II, section 2, clause 1.
Article II, section 2, clause 7.
Article II, section 3.
Article II section 3, clause 1.
Article II, section 3, clause 7.
Article III, section 2.

Statutes of the United States:

18 U.S.C. 371; 62 Stat. 701.
18 U.S.C. 1001; 62 Stat. 749.
18 U.S.C. 1503; 82 Stat. 1115.
18 U.S.C. 1621; 78 Stat. 995.
18 U.S.C. 1623; 84 Stat. 932.
Jencks Act, 18 U.S.C. 3500; 84 Stat. 926.
18 U.S.C. 3731; 84 Stat. 1890.
28 U.S.C. 44; 82 Stat. 183.
2 U.S.C. 133; 85 Stat. 742.
28 U.S.C. 1254; 62 Stat. 928.
28 U.S.C. 1291; 72 Stat. 348.
28 U.S.C. 1651; 63 Stat. 102.
Presidential Libraries Act, 44 U.S.C. 2107; 82 Stat. 1288.
44 U.S.C. 2108(c); 82 Stat. 1289.

Rules:

Rule 26, Federal Rules of Civil Procedure.
Rule 6(e), Federal Rules of Criminal Procedure.
Rule 17(c), Federal Rules of Criminal Procedure.

Regulations:

Department of Justice Order No. 551–73 (November 2, 1973), 38 Fed. Reg. 30, 738, adding 38 C.F.R. ss 0.37, 0.38, and Appendix to Subpart G–1.
Department of Justice Order No. 554–73 (November 19, 1973), 38 Fed. Reg. 32, 805, amending 38 C.F.R. Appendix to Subpart G–1.

STATEMENT

This case presents for review an opinion and order of a federal district court holding that it has jurisdiction to intervene in a dispute between the President and the Special Prosecutor, jurisdiction to review a claim of privilege asserted by the President as to various executive materials, and jurisdiction to order the President, by compulsory process, to produce subpoenaed items for *in camera* review. Review is also sought of the lower court's order denying, without opinion, the President's motion to expunge from the record any finding by a grand jury that he was an unindicted co-conspirator in a criminal proceeding.

A. THE INDICTMENT

On June 5, 1972, a federal grand jury of the United States District Court for the District of Columbia was empanelled. To assist that grand jury, the President

voluntarily waived all claim of privilege as to the personal testimony of his advisors and aides on all Watergate-related matters. Following the decision in *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973), the President provided the grand jury with numerous documents and other materials including tape recordings.

On March 1, 1974, the grand jury returned an indictment charging seven individuals with one count each of conspiracy, 18 U.S.C. 371 (J.R. 5a–39a).[2] Four of the defendants were also charged with counts of obstruction of justice, 18 U.S.C. 1503; making false statements to agents of the Federal Bureau of Investigation, 18 U.S.C. 1001; perjury, 18 U.S.C. 1621; and making false declarations to a grand jury or court, 18 U.S.C. 1623.[3]

On March 1, 1974, the grand jury also lodged a report with the district court which it filed under seal. In its accompanying report and recommendation, the grand jury stated that it had heard evidence bearing on matters within the primary jurisdiction of the Committee of the Judiciary of the House of Representatives and recommended that the sealed materials be submitted to the Committee. This material was subsequently transmitted to the Committee by order of the court dated March 18, 1974.[4]

[2] Those charged were Charles Colson, John Ehrlichman, H. R. Haldeman, Robert C. Mardian, John Mitchell, Kenneth W. Parkinson and Gordon Strachan.

[3] The validity of the entire indictment is presently being challenged by defendant Haldeman in the district court on the ground that the grand jury had been improperly continued past its term, and therefore had no authority at the time the indictment was returned. See H. R. Haldeman "Motion to Dismiss Indictment" filed May 1, 1974, in *United States* v. *Mitchell*, et al., (D.D.C. Cr. No. 74–110).

Subsequently, it was learned that the grand jury in a separate report named, among others, Richard M. Nixon as an "unindicted co-conspirator."

B. THE SPECIAL PROSECUTOR'S SUBPOENA

On April 16, 1974, the Special Prosecutor, Leon Jaworski, moved the district court for an order pursuant to Rule 17(c), Federal Rules of Criminal Procedure, directing the issuance of a subpoena to Richard Nixon, President of the United States, for the production and inspection of certain presidential material. This material consists of tapes and other electronic and mechanical recordings or reproductions and any memoranda, papers, transcripts, and other writings, relating to 64 confidential conversations between the President and his closest advisors. (J. A. 42a–46a). This motion was subsequently joined in by three of the defendants, Robert C. Mardian, John D.

[4] The President declined to express his views on the propriety of the transmittal because in his view, such matters were within the court's own discretion. In its decision authorizing the transmittal of this material, however, the court noted that the grand jury report drew no accusatory conclusions, deprived no individual of an official forum in which to respond, was not a substitute for indictments where such indictments might properly issue, and contained no recommendations, advice, or statements that infringed on the prerogatives of the other branches of the government. *In Re Report and Recommendations of the June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives*, 370 F. Supp. 1219 (D.D.C. 1974).

Ehrlichman, and Charles W. Colson, who is no longer a defendant in this proceeding.[5]

On May 1, 1974, the President, through his counsel, entered a special appearance and moved to quash the subpoena *duces tecum*. (J.A. 47a) A formal claim of privilege was filed by the President regarding the subpoenaed presidential materials with the exception of those portions of the conversations which had already been made public by the President. (J.A. 48a) On May 3, 1974, the Special Prosecutor moved the district court for an order pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, authorizing the disclosure of matters occurring before the grand jury to the extent necessary to prepare its memorandum in response to the President's motion to quash. At an *in camera* hearing on May 6, 1974, the district court ruled that the grand jury material could be filed with the court under seal. On May 10, 1974, the Special Prosecutor submitted a memorandum in opposition to the motion to quash, accompanied by an appendix to support a claim of relevancy for the particular subpoenaed materials. (S.P.S.A.)[6] In part, the Special Prosecutor in this memorandum relied upon the finding by the grand jury that the President was an unindicted co-conspirator to establish the relevancy of many of the subpoenaed items and to overcome the presumptively privileged nature of the material as

[5] On June 3, 1974, Charles Colson plead guilty to the felony of obstruction of justice in violation of 18 U.S.C. 1503 in the case of *United States* v. *Ehrlichman et al.*, (D.D.C. Cr. No. 74-116).

[6] The reference "S.P.S.A." is to the Special Prosecutor's Sealed Appendix.

required by *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973).

On May 13, 1974, the President, through his counsel, filed a special appearance and motion to expunge the grand jury finding on the ground that such a finding was beyond the authority of the grand jury. (J.A. 3a) The President also submitted a point-by-point response to the Special Prosecutor's analysis of the relevancy of the subpoenaed materials. (P.S.A. 1–7)[7] Following oral arguments heard *in camera* on May 13, 1974, the Special Prosecutor filed a further memorandum under seal on May 17, 1974.

C. DISTRICT COURT'S OPINION

On May 20, 1974, the district court entered its opinion and order denying the President's motion to quash and his motion to expunge. The court further ordered the President to produce the subpoenaed materials together with an index and analysis of each item, and a copy of the tape of each portion of those conversations previously transcribed and published. (J.A. 3a)

Regarding its jurisdiction, the district court held that under *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973), the court had the authority to rule on the scope and applicability of executive privilege and that its jurisdiction was not affected by the intra-executive nature of the dispute, for the President was required to consult with congressional leaders prior to attempting to abridge the independence and authority granted to the Special Prosecutor. In the absence of such action, the court found it had jurisdiction to entertain

[7] The reference "P.S.A." is to the President's Sealed Appendix.

this suit. The district court did not, however, address itself to the question of whether the President had ever delegated to the Special Prosecutor his authority as Chief Executive to determine what materials would not be available to a federal prosecutor upon request, and in the absence of such a delegation on what basis the court had jurisdiction to intervene in the prosecutorial discretion of the President.

On the merits, the court ruled that the requirements of Rule 17(c) had been met and that the Special Prosecutor had demonstrated the "compelling need" required under *Nixon* v. *Sirica* to overcome the presumptively privileged nature of the presidential communications. Therefore, the court ordered the President or any subordinate officer with custody or control of the materials to deliver the subpoenaed items to the court on April 18, 1974. The district court denied, without opinion, the President's motion to expunge the finding of the grand jury that the President was an unindicted co-conspirator. (J.A. 3a)

D. SUBSEQUENT EVENTS

On May 24, 1974, the President filed a notice of appeal in the district court, docketed the appeal in the Court of Appeals for the District of Columbia Circuit (D.C. Cir. No. 74–1534), and filed therein under seal, a petition for a writ of mandamus (D.C. Cir. No. 74–1532). On May 24, 1974, the Special Prosecutor filed in this Court a petition for a writ of certiorari before judgment which was granted with expedited briefing schedule, by order of May 31,

1974.[8] The President, through his counsel, on June 6, 1974, filed under seal a cross-petition for a writ of certiorari before judgment which was granted by order of June 15, 1974.

On June 6, 1974, the President, through his counsel, also entered a special appearance and moved the district court to lift its protective order regarding the grand jury's naming of certain individuals as co-conspirators and to any additional extent deemed appropriate by the court on the grounds that public disclosure by the news media made the reasons for continuance of the protective order no longer compelling. By order of June 7, 1974, the district court removed its protective order. On June 10, 1974, the Special Prosecutor and counsel for the President jointly moved this Court to unseal those portions of the briefs and oral argument in the lower court which related to the action of the grand jury regarding the President. This Court denied that motion on June 15, 1974, except for the grand jury's immediate finding relating to the status of Richard M. Nixon as an unindicted co-conspirator.

The President's cross-petition for a writ of certiorari raised the issue of a grand jury's authority to charge an incumbent President as an unindicted co-conspirator in a criminal proceeding. In conjunction therewith, the President, through his counsel, on June 10, 1974, entered a special appearance and pursuant to Rule 6(e), Federal Rules of Criminal Proce-

[8] Unfortunately, the accelerated schedule under which this case is being argued has not permitted the kind of time for the precise and detailed preparation of briefs that Counsel feel the historic nature of both the case and occasion requires.

dure, moved the district court to disclose to the President any and all transcripts, tapes and recordings of Presidential conversations, grand jury minutes and exhibits, and any and all other matters occurring before the grand jury which pertained to the grand jury action in naming or authorizing the Special Prosecutor to identify Richard M. Nixon as an unindicted co-conspirator. It was requested that this material be transmitted as part of the record to this Court. This motion was denied by the district court on June 18, 1974.

On June 19, 1974, the President moved this Court to have the materials disclosed and transmitted to this Court in order that both the President and the Court would have the entire record upon which to present and decide this case.

INTRODUCTION

In a very real sense, every case that comes before this Court is unique; but few in the Nation's history have cut so close to the heart of the basic constitutional system in which our liberties are rooted.

Thus the stakes are enormously high, from a constitutional standpoint. At the same time, and making the Court's judgment more difficult, the case comes wrapped in the passions of a dramatic conflict which has dominated the Nation's headlines for more than a year. This is a conflict which now has involved all three branches of the Government, and pits their constitutional rights and responsibilities one against another.

Just as the first allegiance of this Court is to the Constitution, the first responsibility of this Court

must now be to decide the case before it in a way which preserves the balances that are central to the Constitution.

At its core, this is a case that turns on the separation of powers.

All other considerations are secondary, because preserving the integrity of the separation of powers is vital to the preservation of our Constitution as a living body of fundamental law. If the arguments of the Special Prosecutor were to prevail, the constitutional balance would be altered in ways that no one alive today could predict or measure.

The questions presented reach beyond the exigencies of the moment; beyond the needs of any particular criminal prosecution; beyond the interests of any particular Administration.

The extraordinary nature of this case stems partly from the issues directly presented, and partly from the coloration placed on those issues by the surrounding circumstances.

It would do justice neither to the parties nor to the issues if this were treated as just another case, or simply as an appeal from a discovery procedure in a criminal action against private individuals. It is, in fact, an extraordinary proceeding intrinscally related to the move now pending in the Congress to impeach the President of the United States.

In effect, court process is being used as a discovery tool for the impeachment proceedings—proceedings which the Constitution clearly assigns to the Congress, not to the courts. This is so because of the particular relationship which has evolved among the Special

Prosecutor, the district court and the House Judiciary Committee, and because of the impact which any presidential action with regard to the subpoenas issued would inevitably have on the impeachment proceedings. As a result of the history of the so-called Watergate cases in the district court, the Special Prosecutor is well aware that the district court feels obligated to turn over to the Judiciary Committee any information that might bear on the pending congressional action. Thus the effect, whatever the intent, of the discovery procedures being pressed by the Special Prosecutor would be to produce evidence for the Congress that the Congress could not obtain by its own procedures.

As a result, there has been a fusion of two entirely different proceedings: one, the criminal proceeding involving various individual defendants, and the other the impeachment proceeding involving the President. The first lies in the courts; the second lies in the Congress. The Special Prosecutor strengthens this fusion by utilizing the unsubstantiated, unprecedented and clearly unconstitutional device of naming the President as an unindicted co-conspirator in the criminal cases, with the apparent purpose of strengthening his claim to recordings of presidential conversations as potential evidence in the criminal cases.

Two processes—each with an entirely different history, function and structure—have become intertwined, and the resulting confusion, both conceptual and procedural, is manifestly unfair to the President as an individual and harmful to the relationship between his office and the legislative branch.

To place the present events in perspective, it is useful to reflect on how this case would have been viewed in normal times. If there were no impeachment pending, and if the Special Prosecutor used the device of naming the President as an unindicted co-conspirator in order to obtain recordings of private presidential conversations, on which the President had interposed a claim of executive privilege, the Special Prosecutor's request would be given short shrift.

If this procedure were allowed to go forward, inevitably affecting the impeachment inquiry, it would represent an expansion of the Court's jurisdiction into the impeachment process that the Constitution assigns solely to the House of Representatives. Whatever the combination of circumstances producing it, the result would be clear: an expansion of the Court's jurisdiction into a realm that the Constitution clearly prohibits. It follows necessarily that the courts may not be used, either deliberately or inadvertently, as a back-door route to circumvent the constitutional procedures of an impeachment inquiry, and thus be intruded into the political thicket in this most solemn of political processes.

Anyone who has practiced before this Court is familiar with the observation of Justice Holmes that "(g)reat cases, like hard cases, make bad law." This is true if the pressures of the moment allow the courts to be swayed from their rigid adherence to great principles; if remedies for the perceived passing needs of the moment are allowed at the expense of those enduring constitutional doctrines that have preserved our system of ordered liberty through the

ages. Of those doctrines, none is more fundamental to our government structure itself than the separation of powers—with all of its inherent tensions, with all of its necessary inability to satisfy all people or all institutions all of the time, and yet with the relentless and saving force that it generates toward essential compromise and accommodation over the longer term even if not always in the shorter term. Often a price has to be paid in the short term in order to preserve the principle of separation of powers, and thereby to preserve the basic constitutional balances, in the longer term. The preservation of this principle, the maintenance of these balances, are at stake in the case now before this Court.

SUMMARY OF ARGUMENT

The district court order of May 20, 1974, is an appealable order under 28 U.S.C. 1291, for unless review is granted now the President's claimed right will be irremediably lost. This Court also has jurisdiction to entertain and decide the petition for mandamus transmitted by the Court of Appeals under 28 U.S.C. 1651 because the lower court's decision exceeded that court's jurisdiction.

Under the doctrine of separation of powers, the Judiciary is without jurisdiction to intervene in the intra-branch dispute between the President and the Special Prosecutor. The duty to determine whether disclosure of confidential presidental communications is in the public interest has not been, and cannot be, delegated to the Special Prosecutor.

Under the standards set forth in *Baked* v. *Carr,* 369 U.S. 186 (1962), this intra-branch dispute raises

a political question which the federal courts lack jurisdiction to decide. The district court does not have the power to substitute its judgment for that of the President on matters exclusively within the President's discretion.

Inherent in the executive power vested in the President under Article II of the Constitution is executive privilege, generally recognized as a derivative of the separation of powers doctrine. The powers traditionally asserted by the other branches support the validity of the claim of confidentiality invoked by the President.

Even if this Court were to determine that a presidential privilege is subject to judicial supervision, the lower court erred in refusing to quash the subpoena since the Special Prosecutor failed to demonstrate the "unique and compelling need" required by *Nixon* v. *Sirica,* 487 F.2d 700 (D.C. Cir. 1973), to overcome the presumptively valid claim of presidential privilege.

However, even before a determination can be made as to whether the President's assertion of executive privilege is overcome, the Special Prosecutor has the burden of proving that his subpoena meets the requirements of Rule 17(c), Federal Rules of Criminal Procedure. An analysis of the showing made by Special Prosecutor in the court below demonstrates that he failed to meet the case law criteria developed to prevent abuse of Rule 17(c). For this reason alone the district court erred in refusing to quash the subpoena.

The President is not subject to the criminal process whether that process is invoked directly or indirectly.

The only constitutional recourse against a President is by impeachment and through the electoral process. The naming of the President as an unindicted co-conspirator by an official body is a nullity which both prejudices the ongoing impeachment proceeding and denies due process to the President. The grand jury's action does not constitute a *prima facie* showing of criminality and is without legal effect to overcome a presidential claim of executive privilege.

ARGUMENT

I. THIS COURT MAY REVIEW THE MAY 20, 1974, ORDER OF THE DISTRICT COURT BY EITHER ONE OF TWO ALTERNATIVE METHODS:

A. BY APPEAL PURSUANT TO 28 U.S.C. 1291

The district court order of May 20, 1974, denying the motion of Richard Nixon, President of the United States, to quash a subpoena *duces tecum* directed to him at the request of the Special Prosecutor is an appealable order under 28 U.S.C. 1291.[9]

28 U.S.C. 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

[9] Although this particular action springs from a criminal proceeding, it is a collateral matter of sufficient independence to warrant civil treatment under 28 U.S.C. 1291 and applicability of the reasoning of *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949), a civil case, and its progeny. See *Carroll* v. *United States*, 354 U.S. 394, 403, (1957). See also *United States* v. *Ryan*, 402 U.S. 530, 532 (1971).

Under the criteria established by this Court for determining finality, it is clear that this order should be considered a "final order" and therefore subject to an immediate appeal. In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the Court held that a denial of defendant-corporation's motion to compel the plaintiff-shareholder to produce security for payment of reasonable expenses incurred by the corporation in defense of the shareholder's derivative suit, should the plaintiff's claim fail, constituted an appealable order under 28 U.S.C. 1291. Justice Jackson explained the rationale of the Court:

> [T]his order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. (337 U.S. at 546).

Following this decision, the Court in *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964), reiterated its previous approach in this area and held appealable an order granting a motion to strike a particular cause of action (a second cause of action survived). In discussing appealability, Justice Black emphasized that "this Court has held that the requirement of finality is to be given a 'practical rather than a technical construction.'" 379 U.S. at 152. He further noted that "in deciding the question of finality

the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'" 379 U.S. at 152–153.

In light of the foregoing judicial precedent, this Court, on May 28, 1974, decided *Eisen* v. *Carlisle & Jacquelin*,—U.S.—(42 U.S.L.W. 4804, May 28, 1974). In *Eisen*, the plaintiff filed a class action on behalf of himself and all other odd-lot traders on the New York Stock Exchange charging various brokerage firms with numerous breaches of federal antitrust and securities laws. After a myriad of battles over the class action aspect, the district court finally held the suit maintainable as such an action. The brokerage firms appealed to the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. 1291, over the plaintiff's vigorous objection of non-appealability. The Court of Appeals, for reasons irrelevant to this case, dismissed the suit as a class action. On further review, this Court met the issue of appealability head-on.

This Court, in concluding that the Court of Appeals had possessed jurisdiction under 28 U.S.C. 1291, relied upon *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949). Justice Powell, speaking for the Court, called attention to two dispositive elements: (1) The order of the district court had *conclusively* determined, by rejection, the claim of the brokerage firms on the class action issue, and (2) That order was "a final disposition of a claim of right which is not an ingredient of the cause of action and does not require consideration with it," i.e. "it concerned a collateral matter that

could not be reviewed effectively on appeal from the final judgment." 42 U.S.L.W. at 4808–4809.

Applying these tests to the facts of this particular case in not difficult; neither is the result. The district court's order rejected the President's position, both on jurisdictional grounds and on the merits, and ordered the production of all subpoenaed items for an *in camera* inspection.[10] Therefore unless review is granted at this stage of the proceeding, the President's claimed right will be irremediably lost[11] because, as a non-party to the primary suit, he will not be able to appeal from the criminal judgment.[12] Moreover, if the

---

[10] *United States* v. *Mitchell*, Cr. No. 74–110 (D.D.C. May 20, 1974) at pp. 3–7.

[11] In *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159, 162 (1973), Justice Douglas, speaking for a unanimous Court, held a judgment of the Supreme Court of North Dakota to be "final" even though that court had remanded the case to a state administrative board for further hearings; to do otherwise would have deprived the petitioner of a constitutional issue which would have been lost. Although decided under 28 U.S.C. 1254, dealing with review of state judgments, the decision and language reflected the traditional requirements of 28 U.S.C. 1291, set out in *Cohen*, *supra*. See *United States* v. *Ryan*, 402 U.S. 530, 532 (1971).

[12] In addition, the observation by the court in *Nixon* v. *Sirica*, 487 F. 2d 700, 721 n. 100 (D.C. Cir. 1973) is instructive: since the subpoenaed recordings will already have been submitted to the District Court, the opportunity to test the court's ruling in contempt proceedings would be foreclosed. Any ruling adverse to the Special Prosecutor would clearly be a pretrial "decision or order . . . suppressing or excluding evidence . . . in a criminal proceeding. . . ." Thus the District Court's rulings on particularized claims would be appealable by the Presidents as final judgments under 28 U.S.C. 1291 (1970), and by the Special Prosecutor under 18 U.S.C. 3731 (1970). See also the Order of June 18, 1974), in *Nixon* v. *Sirica* and *Jaworski*, (D.C. Cir. No. 74–1618).

materials requested are absolutely privileged, the irreparable nature of the injury resulting from disclosure cannot be questioned.

In a closely analogous case also involving the appealability of a ruling by a district court on a motion to quash a subpoena *duces tecum*, the Court of Appeals for the Fifth Circuit in *Caswell* v. *Manhattan Fire and Marine Insurance Co.*, 399 F. 2d 417, 422 (5th Cir. 1968), stated the following:

> Manhattan contends we are without jurisdiction to review this question. We disagree. Although an order granting or denying a motion to quash a subpoena is normally considered interlocutory and not subject to review by immediate appeal, such an order, like other discovery orders, may be assigned as error on appeal from a final judgment on the merits. See "Developments in the Law—Discovery," 74 Harv. L. Rev. 940, 992 (1961). A nonparty may appeal an order denying his motion to quash when under the circumstances he would be otherwise denied an effective mode of review. *Carter Products, Inc.* v. *Eversharp, Inc.*, 360 F. 2d 868 (7th Cir. 1966); *Covey Oil Co.* v. *Continental Oil Co.*, 340 F. 2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964, 85 S. Ct. 1110, 14 L. Ed. 2d 155 (1965). Compare *Robinson* v. *Bankers Life & Cas. Co.*, 226 F. 2d 834 (6th Cir. 1965). *An order requiring a nonparty to produce documents often will be final insofar as the nonparty is concerned.* Moreover in many cases substantial prejudice may result from denying immediate appellate review. 399 F. 2d at 422. (emphasis added.)

For the above reasons, the same conclusion is mandated here. More recently, the Court of Appeals for the District of Columbia Circuit in *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973), held that the district court's denial of the President's motion to quash a grand jury subpoena was reviewable under the All Writs Act, although the court did not discard "direct appeal as an alternative basis for review in the particular situation before us." 487 F. 2d at 707 n. 21. In addition, the court made particular reference to the unusual circumstances arising in an action involving the President, which further emphasize the critical need for appellate review at this stage of the proceeding:

> The final-order doctrine, as a normal prerequisite to a federal appeal, is not a barrier where it operates to leave the suitor "powerless to avert the mischief of the order." *Perlman* v. *United States*, 247 U.S. 7, 13. 38 S. Ct. 417, 419, 62 L. Ed. 950 (1918). In the case of the President, contempt of a judicial order—even for the purpose of enabling a constitutional test of the order—would be a course unseemly at best. (487 F. 2d at 707 n. 21).

Although there is, as a general rule, a need to avoid piecemeal litigation which may unduly hamper the efficient administration of the courts, *Alexander* v. *United States*, 201 U.S. 117 (1906), this practical consideration has always given way when the rights of an individual will be irreparably affected by delay. *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152–153 (1964).

Under the circumstances presented, the district court's denial of the President's motion to quash is a final order, and is therefore appealable under 28 U.S.C. 1291.

B. BY ENTERTAINING AND DECIDING A PETITION FOR WRIT OF MANDAMUS TRANSMITTED BY A COURT OF APPEALS

We also submit that this Court has jurisdiction to entertain and decide the petition for mandamus transmitted by the court of appeals to this Court under 28 U.S.C. 1651. Pursuant to this Court's order granting the Special Prosecutor's petition for certiorari and the President's cross-petition for certiorari, the entire record before the court of appeals has been transmitted to this Court under the mandate of Rule 25 of the Rules of the Supreme Court of the United States.

The All Writs Statute of the Judicial Code of 1948, 28 U.S.C. 1651, provides that:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.
>
> (b) An alternative writ or *rule nisi* may be issued by a justice or judge of a court which has jurisdiction.

It is appropriate in the present case that this Court entertain and decide the petition for mandamus, because the order entered by the trial court demanding *in camera* inspection of the tape recordings is clearly erroneous and beyond that court's jurisdiction in that it purports to intervene in a wholly intra-executive

dispute. In addition, this Court's discretion to issue this extraordinary writ should be exercised at this stage of the proceedings because judicial action which would necessitate presidential involvement in a criminal contempt proceeding would be action totally insensitive to the role of the Office of the Presidency in our framework of government, without judicial benefits to be gained.

This Court in *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 259–260 (1957), recognized that there are instances when a judgment that is not final and appealable under 28 U.S.C. 1291 must be subject to further review so as not to result in an injustice, and Congress via 21 U.S.C. 1651 has provided an effective remedy. In determining what is "necessary or appropriate" within the scope of 21 U.S.C. 1651, it is clear that this section operates in aid of this Court's appellate jurisdiction, for in *Ex parte Peru,* 318 U.S. 578 (1943), this Court considered this question in relationship to the Judiciary Act of 1925, the predecessor of this Act, and concluded that:

> The jurisdiction of this Court to issue common law writs in aid of its appellate jurisdiction has been consistently sustained. The historic use of writs of prohibition and mandamus directed by an appellate to an inferior court has been to exert the revisory appellate power over the inferior court. The writs thus afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction, or of compelling it to exercise its authority when it is its duty to do so. Such has been the office of the writs when di-

> rected by this Court to district courts, both before the Judiciary Act of 1925 and since. (318 U.S. at 582–583).

This Court also stated that:

> The jurisdiction of this Court to issue such [common law writs], like its jurisdiction to grant certiorari, is discretionary. The definite aim of the 1925 Act was to enlarge, not to destroy, the Court's discretionary jurisdiction. That aim can hardly give rise to an inference of an unexpressed purpose to amend or repeal the statutes of the United States conferring jurisdiction on the Court to issue the writs, or an inference that such would have been the purpose had repeal been proposed. The exercise of that jurisdiction has placed no undue burden on this Court. (318 U.S. at 585).

Once having the power to grant this writ, we submit this is a most appropriate instance to exercise that power, for the above reasons. In its recent statement this Court reviewed many of the instances where the writ of mandamus has been used; however, none are as timely and imperative as the present case. In *Will* v. *United States,* 389 U.S. 90 (1967), Chief Justice Warren, speaking for the Court, stated:

> The peremptory writ of mandamus has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' *Roche* v. *Evaporated Milk Assn.,* 319 U.S. 21, 26 (1943). While the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction', it is clear that only exceptional circumstances amounting to

> a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy, *DeBeers Consol. Mines, Ltd.* v. *United States,* 325 U.S. 212, 217 (1945). Thus, the writ has been invoked where unwarranted judicial action threatened 'to embarrass the execution arm of the Government in conducting foreign relations,' *Ex parte Peru,* 318 U.S. 578, 588 (1943), where it was the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations, *Maryland* v. *Soper,* 270 U.S. 9 (1926), where it was necessary to confine a lower court to the terms of an appellate tribunal's mandate, *United States* v. *United States Dist. Court,* 344 U.S. 258 (1948), and where a district judge displayed a persistent disregard of the Rules of Civil Procedure promulgated by this Court, *LaBuy* v. *Howes Leather Co.,* 352 U.S. 249 (1957); see *McCullough* v. *Cosgrave,* 309 U.S. 634 (1940); *Los Angeles Brush Mfg. Corp.* v. *James,* 272 U.S. 701, 706, 707 (1927) (dictum).
> (389 U.S. at 95).

Thus, we submit that it is an appropriate exercise of jurisdiction under 28 U.S.C. 1651 for this Court to entertain a writ of mandamus transmitted to it by a Court of Appeals.

II. THE COURT LACKS JURISDICTION OVER AN INTERNAL DISPUTE OF A CO-EQUAL BRANCH [13]

Under the firmly established doctrine of separation of powers, the Judiciary is without jurisdiction to

[13] The Court should be advised that a difference of opinion exists between the Special Prosecutor and Special Counsel to the President as to the propriety of presenting this argument. The Special Prosecutor contends that as an inducement to his

intervene in the solely intra-executive dispute presented here. This entire dispute, between two entities within the executive branch of the government, concerns the prosecutorial discretion vested in the executive branch and involves only the issue of what executive materials should be available to aid in a criminal prosecution. In this respect, this case differs fundamentally from *Nixon* v. *Sirica* 487 F.2d 700 D.C. Cir. 1973), which involved a grand jury subpoena directed to the President and as such represented an inter-branch dispute.

The ultimate authority over all executive branch decisions is, under Article II of the Constitution, vested exclusively in the President of the United States. The President has neither waived nor delegated to the Special Prosecutor his duty to determine what confidential presidential documents shall be made available to another executive officer. Therefore, in the absence of a delegation of this duty, the President, as the chief executive officer, and not the Special

accepting his position, he was provided free access to the courts to resolve any dispute with the President involving the claim of executive privilege. Special Counsel to the President has not been able to confirm that the President at any time agreed to forego any legal remedies available to him in opposing the efforts of the Special Prosecutor to obtain materials over which the President claimed executive privilege. Be that as it may, the jurisdiction of the court cannot be stipulated by the parties and counsel have a duty to call the attention of the court to the possible lack of jurisdiction. See discussion *infra* at pp. 43–44. See also the excellent discussion of this jurisdictional question published by Professor Bickel at an earlier stage of the Special Prosecutor's efforts to obtain presidential tape recordings. *The Tapes, Cox, Nixon*, The New Republic (September 29, 1973).

Prosecutor or the Judiciary, is and remains the final authority as to what presidential material may be utilized in the furtherance of any prosecution. Because the President has not delegated this duty and responsibility to the Special Prosecutor, it is unnecessary for this Court to even consider whether such a delegation of responsibility is constitutionally permissible. *United States* v. *Burr*, 25 F. Cas. 187, 192 No. 14694 (C.C.D. Va. 1807),[14] See also *Williams* v. *United States*, 1 How. (14 U.S.) 290, 297 (1843); *Runkle* v. *United States*, 122 U.S. 543, 557 (1887); *United States* v. *Fletcher*, 148 U.S. 84, 88 (1893); *French* v. *Weeks*, 259 U.S. 326, 334 (1922); 38 Op. Att'y. Gen. 457 (1936). Accordingly, this entire dispute is intra-executive in nature and beyond the jurisdiction of this Court.[15]

At the outset, we wish to make clear to the Court that we do not question the jurisdiction of the Court to resolve any disagreement or conflict between the various independent but co-equal branches of the government, *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137 (1803). Nor do we challenge the jurisdiction of the court to negate an act performed by one branch in excess of its constitutionally delegated authority. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). However, under the clearly enunciated

[14] In *Burr*, the Court specifically stated:

"In this case, however, the President has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by himself, not by another for him." (25 F. Cas. at 192.)

[15] We do not challenge the jurisdiction to a court to entertain a properly documented request by a defendant for exculpatory materials. *Brady* v. *Maryland*, 373 U.S. 83 (1963).

doctrine of separation of powers adopted by the Framers of the Constitution, we do challenge the authority of the court or any branch of the government to intervene in a solely intra-branch dispute, even at the request of a disputant, whether an individual member of that branch, an established committee, or a recognized department. Certainly, an intra-branch dispute, regardless of the context in which it arises, is within the exclusive jurisdiction of that body alone and can properly be resolved, if necessary, only by the constitutionally designated official or body vested with the ultimate responsibility for that branch of government.

The concept of separation of governmental powers is deeply rooted in the history of political theory, finding its early expression in the works of Aristotle [16] who recognized the fundamental distinction between the legislative, executive and judicial functions.[17]

Although subsequently elaborated upon by many historians and scholars, the principal of separation of the branches of government was most familiar to colonial America in the writings of Locke [18] and Montesquieu.[19]

In the most influential political work of its day, Montesquieu in *The Spirit of Laws* wrote:

> In every government there are three sorts of power: the legislative, the executive * * * the

[16] *Aristotle's Politics*, 197–198 (B. Jowett transl. 1943).

[17] The early history of the doctrine of separation, as set forth above, is from Forkosch, *Separation of Powers*, 41 U. Colo. L. Rev. 529 (1969).

[18] J. Locke, *An Essay Concerning the True Original Extent and End of Civil Government* (J. W. Gough, ed. 1947).

[19] Montesquieu, *The Spirit of Laws* (38 Great Books of the Western World, 1900).

> judiciary * * * When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; * * * Again, there is no liberty if the judicial power be not separated from the legislative and executive.
>
> Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
>
> There would be an end of everything were the same men or the same body, whether of nobles or of the people to exercise all three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.[20]

It was this philosophy that influenced the Framers of the Constitution as they began their task of developing a form of government that would survive change and crisis over the long future.[21]

Even prior to the opening days of the Constitutional Convention, the doctrine of separation had been accepted by the states. This is exemplified by the Constitution of the State of Massachusetts, adopted in 1780, which provided:

> Article XXX: In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial pow-

[20] *Id.* Bk XI, ch. 6 at 70.

[21] *The Federalist* No. 47 (J. Madison).

ers or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men.[22]

At the Constitutional Convention, the theory of separation was not seriously questioned. The tripartite form of government introduced by the Virginia proposal [23] was adopted in principle by the Convention [24] and referred to the Committee for Detail for implementation.[25] As described by the notes of James Wilson, the Committee set forth the tripartite principle and specifically stated that the legislative power of the United States shall be vested in Congress, the executive power in a single person, and the judicial power in a Supreme Court.[26] Following the submission of the Committee report to the full Convention, the structure and organization of the three branches were extensively debated but not the principle of separation itself. The separation doctrine as submitted by the Committee on Detail emerged from the debates intact and remained substantially unchanged by the Committee on Style.[27]

[22] At the present time 40 state constitutions expressly provide for a separation of powers and the remaining states have provisions substantially identical to the United States Constitution, W. Dodd, *State Government*, 58 (2d ed. 1928); See also: Constitutions of Hawaii (1959) and Alaska (1959).

[23] 1 Farrand, *Records of the Federal Convention of 1787*, 20-21 (rev. ed. 1966); [hereinafter cited as *Farrand*].

[24] 1 *Farrand* 30-31.

[25] 2 *Farrand* 129.

[26] 2 *Farrand* 152, 171, 172.

[27] 2 *Farrand* 590, 597, 600.

Although it is clear that a system of checks and balances was incorporated into the structure to avoid a domination or usurpation of power by any one branch, it was equally clear that each branch would be free to carry on its own delegated functions free from interference by a coordinate branch. James Madison eloquently stated the sentiment, which pervaded the Convention: "If it be essential to the preservation of the liberty that the Legisl:Execut: & Judiciary powers be separate, it is essential to the maintenance of the separation, that they should be independent of each other." [28] In further emphasizing this concept of separation and independence, James Wilson wrote that the independence of each department requires that its proceedings "shall be free from the remotest influence, direct or indirect of either of the other two." [29]

The doctrine of separation of powers, as a vital and necessary element of our democratic form of government, has long been judicially recognized. *United States* v. *Klein*, 13 Wall (80 U.S.) 128 (1872). As early as 1879, this Court stressed the integrity and independence of each branch of the government, when it stated: "One branch of the government cannot encroach on the domain of another without danger." The safety of our institutions depends in no small degree on a strict observance of this salutary rule." *Sinking Fund Cases*, 99 U.S. 700, 718 (1879). Since that time, the Court has continually reaffirmed this doctrine is an unbroken line of decisions. In *O'Don-*

[28] 2 *Farrand* 34.

[29] Andrews, 1 *The Works of James Wilson*, 367 (1896).

oghue v. *United States,* 289 U.S. 516 (1933) Justice Sutherland speaking for the Court stated:

> If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others—independent not in the sense that they shall not co-operate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly, or indirectly, to, the coercive influence of either of the other departments. (289 U.S. at 530).

Again two years later, the Court added:

> *The fundamental necessity of maintaining each of the three general departments of government, entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question.* So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. *Humphrey's Executor* v. *United States,* 295 U.S. 602, 629–630 (1935) (emphasis added). See also: *Monaco* v. *Mississippi,* 292 U.S. 313 (1934); *National Ins. Co.* v. *Tidewater Co.,* 337 U.S. 582 (1949); *Marshall* v. *Gordon,* 243 U.S. 521 (1917).

It is this constitutional principle which establishes the most fundamental jurisdictional limitation on each of the three branches and prohibits each from intervening in the discretionary powers constitutionally vested in another coordinate branch.

In specifically referring to the jurisdiction of the Judiciary, Chief Justice Warren stated in *Flast* v. *Cohen,* 392 U.S. 83 (1968),

> the jurisdiction of federal courts is defined and limited by Article III of the Constitution . . . [I]n part [that article] defines the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of the government. (392 U.S. at 94–95).

Stated more simply by Justice Story, neither of the departments in reference to each other "ought to possess directly or indirectly an overwhelming influence in the administration of their respective powers." [30]

This concept was elaborated by the Court in *Springer* v. *Philippine Islands,* 277 U.S. 189 (1927):

> Some of our state constitutions expressly provide in one form or another that the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other. Other constitutions, including that of the United States, do not contain such an express provision. But it is implicit in all, as a conclusion logically following from the separation of the several departments. See *Kilbourn* v. *Thompson,* 103 U.S. 168, 190–191 and this separation and the consequent exclusive character of the powers conferred upon each of

[30] *The Federalist* No. 48 (J. Madison) cited in 1 Story, *The Constitution* 530 (4th ed.).

> the *three departments is basic and vital—not merely a matter of governmental mechanism* . . .
>
> It may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise explicitly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power. The existence in the various constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department emphasizes, rather than casts doubts upon, *the generally inviolate character of this basic rule.* 277 U.S. at 201–202 (emphasis added).

It is therefore evident that the district court had no jurisdiction to settle or intervene in an intra-executive disagreement relating to the evidentiary material to be made available from one executive department to another. The settlement of such a dispute in all circumstances is within the exclusive jurisdiction of the chief executive officer, for as this Court stated in *Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935):

> So much is implied in the very fact of the separation of powers of these departments by the Constitution, and in the rule which recognizes the essential co-equality. The sound application of the principal that makes one master in his own house precludes him from imposing his

> control in the house of another who is master there. (295 U.S. at 629–630).

The district court's lack of jurisdiction here is illustrated by a simple analogy. If two congressional committees simultaneously claim jurisdiction over a particular bill, it is unlikely that anyone would question that their sole recourse is an appeal to the congressional committee designated to resolve such disputes, or in its absence, to the Speaker of the House. It is inconceivable that any court would conclude that it had jurisdiction to resolve the matter, even if one or both of the disputants were to appeal to the Judiciary.

Similarly, within the executive branch, if an Assistant United States Attorney seeking information to bolster his case against an individual, were denied access to executive documents by either the Attorney General or the President, he could not properly seek assistance from the Judiciary, for a court would have no jurisdiction in the matter. The same result is mandated here, for as this Court clearly stated in *Kilbourn* v. *Thompson,* 103 U.S. 168, 190 (1880):

> It is also essential to the successful working of this system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.

In attempting to negate this fundamental jurisdictional limitation, the Special Prosecutor relies heavily upon this Court's decision in *United States* v. *Interstate Commerce Commission,* 337 U.S. 426 (1949) for

the proposition that the Judiciary does have jurisdiction to intervene in this dispute. However, that case is plainly inapplicable for it did not involve an intra-branch dispute. On the contrary, there the Department of Justice, on behalf of the executive branch, brought suit against various independent railroads, and on appeal the Commission, a creation of the legislative branch, was joined as a party defendant. Under those circumstances, this Court had jurisdiction to resolve the dispute, for the ICC has been firmly recognized as an administrative body created by Congress to carry into effect its legislative policies and, like the Federal Trade Commission, "cannot in any proper sense be characterized as an arm or eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control." *Humphrey's Executor* v. *United States,* 295 U.S. 602, 628 (1935). Consequently, that dispute was plainly inter-branch in nature, and therefore within the Court's jurisdiction to resolve controversies arising among the various branches. That case does not, however, in any way support the proposition that the court has jurisdiction to entertain a solely intra-executive dispute for the Office of Special Prosecutor, unlike the Commission, was created by the executive branch, within the executive branch, and performs solely executive functions.

In this instance, there can be no question that under the doctrine of separation of powers, the Court lacks jurisdiction to intervene in an intra-executive dispute concerning the availability and use of executive documents to assist in the prosecution of

any individual charged with criminal conduct. As the Judiciary has long recognized, under Article II, section 3 of the Constitution, it is the exclusive prerogative of the executive branch, not the Judiciary, to determine whom to prosecute, on what charges, and with what evidence or information. *Confiscation Cases,* 7 Wall (74 U.S.) 454 (1869); *United States* v. *Cox,* 342 F. 2d 167 (5th Cir), *cert. denied,* 381 U.S. 935 (1965); *Smith* v. *United States,* 375 F. 2d 243, 247 (5th Cir. 1967); *District of Columbia* v. *Buckley,* 128 F. 2d 17 (1942); *Pugach* v. *Klein,* 193 F. Supp. 630 (S.D.N.Y. 1961); and *In Re Grand Jury January 1969,* 315 F. Supp. 662 (D. Md. 1970). Under the Constitution, the President, as the highest executive officer, was expressly delegated all prosecutorial authority when he alone was vested with the responsibility "to take care that the laws be faithfully executed." In *Marbury* v. *Madison,* 1 Cranch (5 U.S.) 137, 164–166 (1803), Chief Justice Marshall expressed the views of the Court as to its jurisdiction to intervene in the authority constitutionally delegated to the President.

> By the Constitution of the United States, the President is invested wiith certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.
>
> In such cases, their acts are his acts; and whatever opinion may be entertained of the

> manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. *The subjects are political: they respect the nation, not individual rights, and being instrusted to the executive, the decision of the executive is conclusive.* (1 Cranch at 165–166) (emphasis added).

Thus, the courts have uniformly recognized that under the Constitution, the Judiciary was given no role in determining any matters within the executive's prosecutorial discretion. As demonstrated in *United States* v. *Cox,* 342 F. 2d 167 (5th Cir.) *cert. denied,* 381 U.S. 935 (1965), even when the executive branch determines, in the face of a grand jury finding of probable cause, that it will not prosecute a particular individual, the courts lack jurisdiction to intervene. In discussing the "absolute and exclusive discretion" of the executive branch in such matters, Judge Wisdom of the United States Court of Appeals for the Fifth Circuit stated in *United States* v. *Cox:*

> [W]hen, within the context of law-enforcement, national policy is involved, because of national security, conduct of foreign policy, or a conflict between two branches of government, the appropriate branch to decide the matter is the executive branch. The executive is charged with carrying out national policy on law-enforcement and, generally speaking, is informed on more levels than the more specialized judicial and legislative branches. In such a situation, a decision not to prosecute is analogous to the exercise of executive privilege. The executive's absolute and exclusive discretion to prosecute

> may be rationalized as an illustration of the doctrine of separation of powers, but it would have evolved without the doctrine and exists in countries that do not purport to accept this doctrine. (concurring opinion) (342 F. 2d at 193).

A fortiori, if it is solely an executive decision to prosecute, it follows that the courts are equally powerless to determine what material within the executive branch must be used in the case. Such a decision is exclusively within the power delegated by the Constitution to the Chief Executive; and the right of the Chief Executive to determine what presidential material shall or shall not be used in the furtherance of this or any prosecution has not been delegated to the Special Prosecutor.

If the President were interfering with a power that had been delegated to the Special Prosecutor, the conclusion of the district court that the President must, under 38 Fed. Reg. 30,738, first consult congressional leaders before taking such action might have been correct. However, it is absolutely clear from the regulation governing the authority of the Special Prosecutor, that the President has not delegated to the Special Prosecutor or any subordinate official, his duty to determine the privileged nature and use of executive material. Therefore, the district court plainly erred in asserting that it had jurisdiction to intervene in this suit on the ground that the President was abridging the independence of the Special Prosecutor over matters that were delegated to him. Moreover, it is unnecessary for this Court to specu-

late on the jurisdictional basis for this suit if the President, had, in fact, delegated his right and responsibilities concerning executive materials to the Special Prosecutor.

On November 27, 1973, Acting Attorney General Bork recreated the Office of Special Prosecutor and delegated to it his authority over all Watergate-related matters. The terms of this delegation are set forth in 38 Fed Reg. 30,738 (November 7, 1973) and the letter of Acting Attorney General Bork to Mr. Leon Jaworski, dated November 21, 1973. In accordance with that agreement, the President has not in the past nor does he here challenge those powers that were given to the Special Prosecutor in Watergate-related matters, including the right to conduct grand jury and other investigations, review documentary evidence available, and determine within the confines of the Constitution whom to prosecute and on what charges. Moreover, all decisions relating to the procedural aspects of prosecution including the right to request immunity for any witness are within the scope of his authority. In these and other areas delegated to him, the Special Prosecutor has had and continues to have complete independence.

However, as the agreement clearly shows on its face, the President has neither waived nor delegated to the Special Prosecutor the President's duty to claim privilege as to all materials, confidential in nature, which fall within the President's inherent authority to refuse to disclose to any executive officer. Nor did Acting Attorney General Bork attempt to delegate such

authority to the Special Prosecutor.[31] On the contrary, the authority granted to the Special Prosecutor by then Acting Attorney General Bork in this regard was specifically limited to at most: "determin[ing] whether or not to contest the assertion of executive privilege or any other testimonial privilege." 38 Fed. Reg. 30,739 (1973).

From this provision, it is abundantly clear that the President has not waived or delegated to the Special Prosecutor his duty to determine within his discretion what executive materials were privileged. Since this decision was retained by the President and falls within the normal scope of his prosecutorial discretion over all criminal cases, the courts are powerless to intervene, even at the request of the Special Prosecutor.

Moreover, the court's fundamental lack of jurisdiction to intervene in the President's prosecutorial discretion or any other executive decision within the realm of his constitutionally delegated authority, was not altered by the arrangement between Acting Attorney General Bork and Mr. Jaworski allowing the Special Prosecutor to determine what testimonial privileges to challenge. It is an elementary rule of jurisdiction, that where the courts constitutionally lack jurisdiction to intervene in a decision, as they do in all decisions concerning prosecutorial discretion, such jurisdiction can neither be waived nor conferred by an

[31] It should be noted that had Acting Attorney General Bork attempted to delegate this right to the Special Prosecutor such a grant of authority would have been void, for the Attorney General himself has never had authority to override or challenge a decision by the Chief Executive and therefore could not delegate such authority to another.

agreement between the parties. *Mitchell* v. *Maurer,* 293 U.S. 237, 244 (1934); *Industrial Addition Association* v. *I.R.S.,* 323 U.S. 310 (1945). Accordingly, even a decision by Mr. Jaworski that he wishes to contest a claim of privilege, either executive or testimonial, will not confer jurisdiction on the court.

Therefore, because the President in all criminal proceedings has the right to determine what confidential or sensitive material should not be used to assist a federal prosecutor, as this right was not delegated to the Special Prosecutor, the court remains without jurisdiction to intervene in his prosecutorial decision by the Chief Executive.

III. THIS INTRA-BRANCH DISPUTE DOES NOT PRESENT A JUSTICIABLE CASE OR CONTROVERSY WITHIN THE MEANING OF ARTICLE III, SEC. 2 OF THE CONSTITUTION

We submit that the prior argument is dispositive of those questions presented to this Court by the Special Prosecutor and mandates that the district court order be vacated. However, should the Court determine that it does have jurisdiction to entertain this suit, it should of is own authority decline to do so, for a resolution of the fundamental issue as to whether it best serves the public interest to disclose presidential material, if not absolutely privileged, would require the Court to resolve a political question.

Underlying the doctrine of political question, is the fundamental notion that many controversies brought before the Court are best resolved by another branch of the government which possesses the necessary familiarity and expertise. This dispute raises a question of justiciability because it involves a political dispute solely between two officials of the executive branch—the President and a lesser official, the Special Prosecutor. Under Article III, Section 2 of the Constitution, the judicial branch does not have the constitutional power to resolve such a political question.

Courts have struggled to establish criteria that would enable them to identify and uniformly deal with political questions. Such criteria have been elusive. *Marbury* v. *Madison,* 1 Cranch (5 U.S.) 137, 164–166 (1803); *Coleman* v. *Miller,* 307 U.S. 433, 454–455 (1939); *Poe* v. *Ullman,* 367 U.S. 497, 508 (1961); and *Flast* v. *Cohen,* 392 U.S. 83 (1968).

It was not until *Baker* v. *Carr,* 369 U.S. 186 (1962), however, that the Court finally succeeded in isolating and articulating a set of criteria for identifying an issue that presents a political question. The Court said:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment

> from multifarious pronouncements by various departments on one question. (369 U.S. at 217).

It is very clear that the Special Prosecutor's request that the district court overrule the legitimate invocation of executive privilege posed a nonjusticiable political question that meets the criteria established in *Baker*. There are no judicially discoverable standards or manageable criteria by which the courts could resolve this political question. The court below was asked to make an initial policy determination that the President has improperly or mistakenly invoked executive privilege against the Special Prosecutor. Such a determination by the lower court is constitutionally impermissible and violates the basic tenets of the separation of powers. Moreover, it is a determination beyond judicial abilities since the Court simply cannot substitute its judgment for that of the President. *Baker* is clear and compelling on this proposition and requires, in this case, recognition that the indicia of nonjusticiability are present.

Moreover, the matter before this Court is a nonjusticiable political question because it arises out of a President exercising a textually demonstrable grant of power from Article II of the Constitution.[32]

[32] Textually demonstrable grants of power are both explicit and implied in Article II of the Constitution. The Supreme Court has stated:

"It is true, that such a power, if it exists, must be derived from implication, and the genius and spirit of our institutions are hostile to the exercise of implied powers. Had the faculties of man been competent to the framing of a system of government which would have left nothing to implication, it cannot be doubted that the effort would have been made by the framers of the Constitution. But what is the fact? There is not in the

Any determination concerning the disclosure of presidential documents necessarily requires the exercise of the unique discretion and expertise of the Chief Executive, for such a decision involves "considerations of policy, considerations of extreme magnitude, and certainty, entirely incompetent to the examination and decision of a court of justice." *Ware* v. *Hylton*, 3 Dall. (3 U.S.) 199, 260 (1796). Only the President is in a position to determine which communications must be maintained in confidence, for the public interest in this matter is a judgment only the President can make. It involves a complex blend of policy, perspective, and knowledge uniquely within the province of the President and the executive branch. Neither the courts nor Congress can claim for themselves the elements of knowledge and perspective necessary to examine and review such a decision.

Gilligan v. *Morgan*, 413 U.S. 1 (1972), confirms the continuing validity of the concept of justiciability; in that case Chief Justice Burger said:

> . . . because this doctrine has been held inapplicable to certain carefully delineated situations, it is no reason for federal courts to assume its demise. The voting rights cases, indeed, have represented the Court's efforts to strengthen the political system by assuring a higher level of fairness and responsiveness to the political processes, not the assumption of a

whole of that admirable instrument a grant of powers which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate." (*Anderson v. Dunn*, 6 Wheat [19 U.S.], 204, 225–226 [1821].) See also, *New York Times* v. *United States*, 403 U.S. 713, 752 n.3 (1971) (Burger, C. J. dissenting).

> continuing judicial review of substantive political judgments entrusted expressly to the coordinate branches of government. (413 U.S. at 11.).

Indeed, in recent political cases with political overtones such as *Powell* v. *McCormick*, 395 U.S. 486 (1969) and *Committee For Nuclear Responsibility* v. *Seaborg*, 463 F. 2d 788 (D.C. Cir. 1971), the issues related to the court's traditional role of interpreting the Constitution or legislation, vis-a-vis the constitutional rights of individuals, and thus are distinguishable from cases which concern discretionary decision-making by a coordinate branch of government.

This Court's resolution of this constitutional confrontation should not restrict the powers of the President by superimposing the decision of a subordinate in the executive branch over the Chief Executive through the impermissible intervention of the judicial branch. Rather, if any action is taken at all, the sole appropriate procedure for the consideration of alleged abuses is by way of impeachment. See *Ex Parte Grossman*, 267 U.S. 87, 121(1925).

IV. A PRESIDENTIAL ASSERTION OF PRIVILEGE IS NOT REVIEWABLE BY THE COURT

A. THE SEPARATION OF POWERS DOCTRINE PRECLUDES JUDICIAL REVIEW OF THE USE OF EXECUTIVE PRIVILEGE BY A PRESIDENT

Justice Douglas, at the threshold of his dissent in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 105 (1973), remarked that "The starting point of a decision usually indicates the result." In this case,

the foundation for the President's assertion of executive privilege is the Constitution.

The Constitution as the embodiment of the grand design of our political system was described in *Kilbourn* v. *Thompson*, 103 U.S. 168, 190–191 (1880), as follows:

> It is believed to be one of the chief merits of the American system of written constitutional law, that all powers entrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined.

The doctrine of the separation of powers, inherent in the nature of our government,[33] was reflected in the Constitution by the definitive expression of the Framers of each of the separate, co-equal branches. In the case at hand, Art. II, sec. 1, cl. 1 is in focus:

> The executive Power shall be vested in a President of the United States of America.

Inherent in that executive power, as part and parcel of the separation of powers, is executive privilege; in this case, more accurately described as presidential privilege. Unless this is so, the full panoply of power embodied in the executive power, would be, in reality,

---

[33] Cf. E. Corwin, *Introduction to Congressional Research Service, The Constitution of the United States of America* XII (1973).

greatly diluted, a concept at odds with the intent of the Framers of the Constitution.[34, 35]

A second parallel source of presidential privilege lies in the common law and its embodiment of the concept of confidentiality as a prerequisite to the effective administration of government. Rather than sapping vitality from our constitutional position, the common law, as described, adds increased force and dimension to it.[36]

[34] Unlike its companion privilege attendant upon the Congress by virtue of the Speech and Debate Clause, executive privilege was not meticulously delineated by the Framers of our Constitution. Its nature as a constitutional privilege, however, is not undermined by that fact. See *Kilbourn* v. *Thompson*, 103 U.S. 168, 189 (1880); see also *Inland Waterways* v. *Young*, 309 U.S. 517, 525 (1940); *United States* v. *Midwest Oil*, 236 U.S. 459, 483, 505 (1915).

[35] We suggest an additional constitutional source of presidential privilege resides in Article II, sec. 1, cl. 8;

> Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: 'I do solemnly swear (or affirm) that I will faithfully execute the Office of the President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.

The duty of the holder of the Office of the President to preserve, protect, and defend the Constitution compels care that Article II, sec. 1, cl. 1 be fully defended from encroachment.

[36] Judge Wilkey, dissenting in *Nixon* v. *Sirica*, 487 F. 2d 700, 763 (D.C. Cir. 1973), succinctly stated:

"The oldest source of Executive Branch privilege, the common sense-common law privilege of confidentiality, existed long before the Constitution of 1789, and might be deemed an inherent power of any government."

This case is important, both to the parties involved and the citizenry at large. "The men and issues were large"[37] in 1807 when the Aaron Burr cases[38] were before Chief Justice Marshall and they are equally so here. Significantly, the precise issue of the "absoluteness" of executive privilege, as applied to presidential communications, has never been squarely confronted and definitively resolved by this Court. This Court's thoughtful consideration of the issues presented is of particular importance because the foundation of the district court's decision,[39] *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973), rested upon a surface assessment that purely social or public policy considerations, as opposed to the Constitution, constituted the rationale for the privilege. 487 F. 2d at 712. As a result, the dimensions of presidential privilege have been miscalculated and its integrity impaired.

The Presidency, as the repository of the executive power of the United States, was forged out of intense controversy during the Constitutional Convention.[40] The debate is well-described by Clinton Rossiter:

> The progress of the Convention toward this decision was labored and uncertain, however, and it often seemed that the hard lessons of the

[37] See dissenting opinion of Judge Wilkey in *Nixon* v. *Sirica*, 487 F. 2d 700, 768 (D.C. Cir. 1973).

[38] *United States* v. *Burr*, 25 F. Cas. 30, No. 14692d (C.C.D. Va. 1807). *United States* v. *Burr*, 25 F. Cas. 187, No. 14694 (C.C.D. Va. 1807).

[39] *United States* v. *Mitchell*, Cr. No. 74–110 (D.D.C. 1974) at 3, 7.

[40] See Congressional Research Service, *The Constitution of the United States of America* 429–433 (1974).

> previous decade would be wasted on a majority of the delegates. Persistent voices were raised against almost every arrangement that eventually appeared in Article II and Wilson and his colleagues were able to score their final success only after a series of debates, decisions, reconsiderations, references to committees, and private maneuvers that still leave the historian befuddled. I have followed the tortuous progress of the incipient Presidency through Madison's *Notes* four times, and I am still not sure how the champions of the strong executive won their smashing victory. It can be said for certain, however, that at least eight decisions on the structure and powers of the executive were taken at different stages of the proceedings, and that out of these arose the Presidency. Everyone of these decisions, with one partial exception that history was shortly to remedy, was taken in favor of a strong executive.[41]

The result of these deliberations was to create an officer who is Chief of State, Chief Executive, Chief Diplomat and Commander-in-Chief.[42] Because of the great role entrusted to the presidency by the Constitution and because the President alone is representative of the whole country,[43] there are important respects in which he is not treated by the law in the

[41] C. Rossiter, *The American Presidency* 55 (1956).

[42] *Id.* at 16.

[43] Lest the President's position be misunderstood, it must be stressed we do not suggest that the President has the attributes of a king. *Inter alia*, a king rules by inheritance and for life. See A. Hamilton, *The Federalist*, No. 69; 3 *Farrand* 301–302; Letter of Pierce Butler, dated May 5, 1788, to Weedon Butler, an English subject.

same fashion as are others.[44] The President is not above the law—but he is responsible to the law in a specific fashion that the Framers, with utmost care, wrote into the Constitution. That historical perspective serves to define the stark language of Article II, section 1, clause 1, that "the executive Power shall be vested in a President * * *" Judge MacKinnon, in his dissenting opinion in *Nixon* v. *Sirica*, 487 F. 2d 700, 750 (D.C. Cir. 1973), described the relationship between the exercise of that executive power and the doctrine of executive privilege:

[44] This fact was recognized by Justices Warren and Douglas, in dissent, in *Barr* v. *Matteo*, 360 U.S. 564, 582–583 (1959), a controversy involving issues of executive immunity:

> *Spalding* v. *Vilas*, *supra*, presents another situation in which absolute privilege may be justified. There the Court was dealing with the Postmaster General—a Cabinet Officer personally responsible to the President of the United States for the operation of one of the major departments of government. Cf. *Glass* v. *Ickes*, 73 App. D.C. 3, 117 F.2d 273; *Mellon* v. *Brewer*, 57 App. D.C. 126, 18 F.2d 168. The importance of their positions in government as policymakers for the Chief Executive and the fact that they have the expressed trust and confidence of the President who appointed them and to whom they are personally and directly responsible suggest that the absolute protection partakes of presidential immunity. Perhaps the *Spalding* v. *Vilas* rationale would require the extension of such absolute immunity to other government officials who are appointed by the President and are directly responsible to him in policy matters even though they do not hold Cabinet positions. But this extension is not now before us, since it is clear that petitioner Barr was not appointed by the President nor was he directly responsible to the President. Barr was exercising powers originally delegated by the President to the Director of Economic Stabilization who redelegated them to the Director of Rent Stabilization (footnote omitted).

> The effective discharge of the presidential duty faithfully to execute the laws requires a privilege that preserves the integrity of the deliberative processes of the executive office. It would be meaningless to commit to the President a constitutional duty and then fail to protect and preserve that which is essential to its effective discharge. Thus the term "effective" is the *sine qua non* that imbues the presidential decisional process with a constitutional shield. The genius of our Constitution lies, perhaps as much as anywhere, in the generality of its principles which makes it susceptible to adaptation to the changing times and the needs of the country. But this much is explicit: '[The President] shall take Care that the Laws be faithfully executed. . . .' U.S. Const. art. II § 3. Is it plausible that the Framers should have charged the President with so basic a responsibility, one upon which every ordered society is premised, and yet left him without that ability effectively to satisfy the high charge? Emphatically, the answer must be, 'No.' The duty and the means of its discharge coalesce and each, the one explicit and the other implicit, finds its source in the Constitution.

Executive privilege as claimed by this President, has been asserted by Presidents beginning with George Washington, just as the legislative and judicial branches have continually asserted and jealously guarded their respective "privileges." The initial invocation occurred when in 1792, the House of Representatives passed a resolution requesting military papers pertaining to the campaign of Major General St. Clair. Although the papers were apparently produced,[45] the consideration given to that request is illustrative:[46]

> First, that the House was an inquest, and therefore might institute inquiries. Second that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: *consequently were to exercise a discretion*. Fourth, that neither the committee nor House had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President. (emphasis added).

Since then, Presidents[47] and Attorneys General have asserted the privilege. Even more important is the fact that Presidents have always acted on the assumption that it is discretionary with them alone, to determine whether the public interest permits production of presidential papers, and the other branches

---

[45] 1 P. Ford, *The Writings of Thomas Jefferson* 303–305 (1893).

[46] 3 *Annals of Congress* 493; 1 P. Ford, at 303–304.

[47] In 1948, President Truman, railing against an anticipated bill from a Republican Congress that would have required every President to produce confidential information even though the President might consider compliance to be contrary to the public interest, had a Memorandum prepared to demonstrate the bill's unconstitutionality. Part of that Memorandum follows:

> Resume and Conclusions
>
> A bird's-eye view of the refusals by seventeen of our Presidents, and their heads of departments, to comply with

of Government have until recently accepted this position. *Senate Select Committee on Presidential Campaign Activities* v. *Richard M. Nixon*. Slip Op. No.

congressional requests for information and papers from the Executive, beginning with 1796 to the present time, follows:

President	Date	Type of Information Refused
George Washington	1796	Instruction to U.S. Minister concerning Jay Treaty.
Thomas Jefferson	1807	Confidential information and letters relating to Burr's conspiracy.
James Monroe	1825	Documents relating to conduct of naval officers.
Andrew Jackson	1833	Copy of paper read by President to heads of departments relating to removal of bank deposits.
	1835	Copies of charges against removed public official.
	1835	List of all appointments made without Senate's consent, since 1829, and those receiving salaries, without holding office.
John Tyler	1842	Names of Members of 26th and 27th Congress who applied for office.
	1843	Report to War Department dealing with alleged frauds practiced on Indians, and Col. Hitchcock's views of personal characters of Indian delegates.
James K. Polk	1846	Evidence of payments made through State Department, on President's certificates, by prior administration.
Millard Fillmore	1852	Official information concerning proposition made by King of Sandwich Islands to transfer Islands to U.S.
James Buchanan	1860	Message of Protest to House against Resolution to investigate attempts by Executive to influence legislation.

74–1258 (D.C. Cir. May 23, 1974); *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973). The opinions over

President	Date	Type of Information Refused
Abraham Lincoln	1861	Dispatches of Major Anderson to the War Department concerning defense of Fort Sumter.
Ulysses S. Grant	1876	Information concerning executive acts performed away from Capitol.
Rutherford B. Hayes	1877	Secretary of Treasury refused to answer questions and to produce papers concerning reasons for nomination of Theodore Roosevelt as Collector of Port of New York.
Grover Cleveland	1886	Documents relating to suspension and removal of Federal officials.
Theodore Roosevelt	1909	Attorney General's reasons for failure to prosecute U.S. Steel Corporation, Department of Commerce.
Calvin Coolidge	1924	List of companies in which Secretary of Treasury Mellon was interested.
Herbert Hoover	1930	Telegrams and letters leading up to London Naval Treaty.
	1932	Testimony and documents concerning investigations made by Treasury Department.
Franklin D. Roosevelt	1941	Federal Bureau of Investigation reports.
	1943	Director, Bureau of the Budget, refused to testify and to produce files.
	1943	Chairman, Federal Communications Commission, and Board of War Communications refused records.
	1943	General Counsel, Federal Communications Commission, refused to produce records.
	1943	Secretaries of War and Navy refused to furnish documents, and permission for Army and Naval officers to testify.
	1944	J. Edgar Hoover refused to give testimony and to produce President's directive.

a long period of years by the highest legal officer [45] in the Government cannot be lightly disregarded. The fact that the litigation arising out of the Watergate investigations is the first time that a subpoena has been directed to force production of presidential papers since Colonel Burr's abortive attempt to subpoena documents from President Jefferson is because it has been universally accepted that there is no power

President	Date	Type of Information Refused
President Truman	1945	Issued directions to heads of executive departments to permit officers and employees to give information to Pearl Harbor Committee.
	1945	President's directive did not include any files or written material.
	1947	Civil Service Commission records concerning applicants for positions.

Note: Truman Memorandum at 44 a, b, c (1948).

In the bird's-eye picture, reference is made to the refusals of Presidents Monroe, Fillmore, Lincoln, and Hayes[;] Monroe's refusal may be found in a message dated January 10, 1825, 2 Richardson, *Messages and Papers of Presidents*, p. 278' [sic] Fillmore's in 5 Richardson, p. 159; Lincoln's in 6 Richardson p. 12, and the refusal in Hayes' administration is dealt with in 17 Cong. Rec. 2332 and 2618.

(In addition, it appears President Kennedy exercised executive privilege four times, the Johnston Administration twice, and, through March 28, 1973, the Nixon Administration fifteen times, four of which were actually claimed by the President. 119 Cong. Rec. 2244–2245 (daily ed. March 28, 1973).

[45] See 11 Op. Att'y Gen. 137, 142–143 (1865) (Atty. Gen. Speed); 20 Op. Att'y Gen. 557, 558 (1893) (Atty. Gen. Olney); 25 Op. Att'y Gen. 326, 331 (1905) (Atty. Gen. Moody); 40 Op. Att'y Gen. 45, 49 (1941) (Atty. Gen., later Justice Jackson).

to compel the President in the exercise of his discretion. Uninterrupted usage continued from the early days of the Republic is weighty evidence of the proper construction of any clause of the Constitution. *Inland Waterways Corp.* v. *Young*, 309 U.S. 517, 525 (1940). Justice Lamar, in *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 472-473 (1915), observed:

> Both officers, lawmakers and citizens naturally adjust themselves to any long continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into regular practices. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of the statute or the exercise of a power, weight should be given to the usage itself—even when the validity of the practice is itself the subject of investigation.

The significance and rationale for this uninterrupted assertion of privilege by holders of the Office of the Presidency, are underscored by reference to the way in which the other co-equal branches of government have regarded the need for confidentiality. Chief Justice Burger, in *New York Times* v. *United States*, 403 U.S. 713, 752 n. 3 (1971), in his dissent, revealed his assessment of privilege:

> With respect to the question of inherent power of the Executive to classify papers, records, and documents as secret, or otherwise unavailable for public exposure, and to secure aid of courts for enforcement, there may be an analogy with respect to this Court. No statute gives this Court express power to establish and enforce

> the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations by whatever judicial measures may be required.

Although Professor Arthur Selwyn Miller and a collaborator have recently argued to the contrary, Miller & Sastri, *Secrecy and the Supreme Court: On The Need For Piercing the Red Velour Curtain,* 22 Buff. L. Rev. 799 (1973), it has always been recognized that judges must be able to confer with their colleagues, and with their law clerks, in circumstances of absolute confidentiality. Justice Brennan has written that Supreme Court conferences are held in "absolute secrecy for obvious reasons." Brennan, *Working at Justice,* in *An Autobiography of the Supreme Court* 300 (Westin ed. 1963). Justice Frankfurter had said that the "secrecy that envelops the Court's work" is "essential to the effective functioning of the Court." Frankfurter, *Mr. Justice Roberts,* 104 U. Pa. L. Rev. 311, 313 (1955).

Congress, too, has seen fit to hold to such a privilege. It is a long established practice of each House of Congress to regard its own private papers as privileged. No court subpoena is complied with by the Congress or its committees without a vote of the House concerned to turn over the documents. *Soucie* v. *David,* 448 F. 2d 1067, 1081–1082 (D.C. Cir. 1971). This practice is insisted on by Congress even when the result may be to deny relevant evidence in a criminal pro-

ceeding either to the prosecution or to the accused person.[49]

Similarly, when President Kennedy refused to disclose to a Senate Subcommittee the names of Defense Department speech reviewers, the Subcommittee,

---

[49] See e.g., 108 Cong. Rec. 3626 (1962), showing Senate adoption of a resolution permitting staff members and former staff members of a Senate Committee to appear and to testify in a criminal proceeding against James Hoffa but forbidding them from taking any documents or records in the custody of the Senate and from testifying about information that they gained while employed in the Senate. In explaining the resolution to the Senate, Senator McClellan said in part: "The Senate recognizes it has certain privileges as a separate and distinct branch of Government, which it wishes to protect." *Id.* at 3627.

On July 16, 1970, counsel for 1st Lt. William L. Calley, Jr., moved in his court-martial proceeding for production of testimony concerning the My Lai incident that had been presented to a subcommittee of the House Committee on Armed Services in executive session. Calley claimed that his testimony would be exculpatory of him and would help him establish his defense in the court-martial. The subcommittee Chairman, Rep. F. Edward Hebert, refused to make the testimony available, advising defense counsel on July 17, 1970, that Congress is "an independent branch of the Government, separate from and equal to the Executive and Judicial branches," and that accordingly only Congress can direct the disclosure of legislative records. He concluded from this that the material requested by the defense was not within the rule of *Brady* v. *Maryland,* 373 U.S. 83 (1963), nor subject to the requirements of the Jencks Act, 18 U.S.C. 3500. Subsequently the military court issued a subpoena to the Clerk of the House of Representatives. The Speaker laid this before the House on November 17, 1970, 116 Cong. Rec. 37652 [1970] but to date the House has taken no action nor given any indication that it will supply the information sought.

On October 4, 1972, the United States Senate bluntly refused, via Senate Resolution, a judicial subpoena for *inter alia,* documentary evidence in the criminal case of *United States* v. *Brewster,* then pending in the federal district court, District of Columbia. 118 Cong. Rec. S. 16, 766 (92d Cong., 2d Sess.).

speaking through Senator Stennis, relied on the privilege of confidentiality Congress enjoys in upholding the President's claim of privilege:

> We now come face to face and are in direct conflicts with the established doctrine of separation of powers * * *.
> I know of no case where the Court has ever made the Senate or the House surrender records from its files, or where the Executive has made the Legislative Branch surrender records from its files—and I do not think either one of them could. So the rule works three ways. Each is supreme within its field, and each is responsible within its field. (Committee on Armed Services, U.S. Senate, *Military Cold War Escalation* and *Speech Review Policies,* 87th Congress, 2d Sess., 512 [1962].).

On June 12, 1974, the United States Senate emphatically reiterated its position on privilege by deed, as well as by word. Senator Eastland, Chairman of the Judiciary Committee, urged, at the request of the Special Prosecutor, passage of a resolution permitting a staff attorney to file a trial affidavit with the Special Prosecutor. Without objection, S. Res. 338 was passed. It reads in part:

> *Resolved*, That by the privilege of the Senate of the United States no evidence under the control and in the possession of the Senate of the United States can, by the mandate of process of the ordinary courts of justice, be taken from such control or possession, but by its permission.
> * * * (Sections 2–4) * * *

> SEC. 5. The said Peter Stockett, Junior, may provide information with respect to any other matter material and relevant for the purposes of identification of any document or documents in such case, if any such document has previously been made available to the public, but he shall respectfully decline to provide information concerning any and all other matters that may be based on knowledge acquired by him in his official capacity either by reason of documents and papers appearing in the files of the Senate or by virtue of conversations or communications with any person or persons.

The considerations of public policy that required the deliberations of the Constitutional Convention be held in confidence for half a century [80] and made it imperative that judges and members of Congress be permitted to work under conditions of absolute confidentiality are particularly compelling when applied

[80] The Framers understood perfectly well that enlightened decision-making requires the kind of frank and free discussion that can only be had when confidentiality is absolutely assured. On May 29, 1787, one of the first acts of the Constitutional Convention was the adoption of the following rule: "That nothing spoken in the House be printed, or otherwise published, or communicated without leave." 1 *Farrand* XV. It was not until 1819, that the Journal of the Convention, a mere skeleton of motions and votes, was made public. The fullest record of the proceedings of the Convention is in Madison's *Notes*. As late as 1831, 44 years after the Convention, Madison thought it was not yet appropriate for those *Notes* to be made public, 3 *Farrand* 497, and they were not published until 1840, four years after his death. 1 *Farrand* xv. President Madison thus anticipated the view of the most distinguished modern student of the Constitution, Paul Freund, who has said: "I sometimes wonder irreverently whether we would have had a Constitution at all if the Convention had been reported by daily columnists." Hughes, *The Living Presidency* 33n. (1973).

to presidential communications with his advisers. As stated by the President on July 6, 1973, in his letter to Senator Sam J. Ervin:

> No President could function if the private papers of his office, prepared by his personal staff, were open to public scrutiny. Formulation of sound public policy requires that the President and his personal staff be able to communicate among themselves in complete candor, and that their tentative judgments, their exploration of alternatives, and their frank comments on issues and personalities at home and abroad remain confidential.

This has been the position of every President in our history, and it has been specifically stated by President Nixon's immediate predecessors.

Writing his memoirs in 1955, President Truman explained that he had found it necessary to omit certain material, and said: "Some of this material cannot be made available for many years, perhaps for many generations." 1 Truman, *Memoirs* x (1955). President Eisenhower stated the point with force on July 6, 1955, in connection with the Dixon-Yates controversy:

> But when it comes to the conversations that take place between any responsible official and his advisers or exchange of little, mere slips of this or that, expressing personal opinions on the most confidential basis, those are not subject to investigation by anybody, and if they are, will wreck the Government. There is no business that could be run if there would be exposed every single thought that an adviser might have, because in the process of reaching an agreed position, there are many, many conflicting opinions to be brought together. And if any commander is going to get the free, unprejudiced opinions of his subordinates, he had better protect what they have to say to him on a confidential basis. *Public Papers of Presidents of the United States: Dwight D. Eisenhower* 1955 at 674 (1959).

Congress recognized the high degree of confidentiality that must attach to presidential papers for many years when it enacted the Presidential Libraries Act of 1955, Pub. L. 84–373, 69 Stat. 695 (1955), now codified in 44 U.S.C. 2107, 2108. That statute encourages Presidents to give their papers to a presidential library, and provides that papers, documents, and other historical materials so given "are subject to restrictions as to their availability and use stated in writing by the donors or depositors * * * The restrictions shall be respected for the period stated, or until revoked or terminated by the donors or depositors or by persons legally qualified to act on their behalf." 44 U.S.C. 2108(c); *Nichols* v. *United States,* 460 F. 2d 671 (10th Cir.), *cert. denied,* 409 U.S. 966 (1972.) Since that Act was passed, the gifts of presidential papers of President Eisenhower, Kennedy, and Johnson have all specified that "materials containing statements made by or to" the President are to be kept "in confidence" and are to be held under seal and not revealed to anyone except the donors or archival personnel until "the passage of time or other circumstances no longer require such materials being kept under restriction." See letter of April 13, 1960, from

President Dwight D. Eisenhower to the Administrator of General Services; Agreement of February 25, 1965, between Mrs. Jacqueline B. Kennedy and the United States and Letter of August 13, 1965, from President Lyndon B. Johnson to the Administrator of General Services. In addition, the letters from President Eisenhower and from President Johnson specifically prohibit disclosure to "public officials" and state, as the reason for these restrictions, that "the President of the United States is the recipient of many confidences from others, and * * * the inviolability of such confidence is esential to the functioning of the constitutional office of the Presidency * * *."

The need to preserve the confidentiality of the Oval Office has been recognized from without as well as by those who have borne the burdens of service there. What Justice Stewart, who was joined by Justice White, said in his concurring opinion in *New York Times Co.* v. *United States,* 403 U.S. 713, 728 (1971), has particular force here:

> And within our own executive departements, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. * * *
> [I]t is clear to me that it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense. (403 U.S. at 728–730).

Of course, international relations and national defense have very special claims to secrecy, but the importance of the President being able to speak with his advisers "freely, frankly, and in confidence" is not confined to those matters. It is just as essential that the President be able to talk openly with his advisers about domestic issues as about military or foreign affairs. The wisdom that free discussion provides is as vital in fighting inflation, choosing Supreme Court Justices, deciding whether to veto a large spending bill, and dealing with the myriad other important questions that the President must confront in his roles as Chief of State and Chief Executive, as it is when he is acting as Chief Diplomat or as Commander-in-Chief. Any other view would fragment the executive power vested in him and would assume that some of his constitutional responsibilities are more important than others. It is true that the President has more substantive freedom to act in foreign and military affairs than he does in domestic affairs, but his need for candid advice is no different in the one situation than in the other.

We submit, with all respect, that if the decision below were allowed to stand it could no longer fairly be contended that the President of the United States is "master in his own house." The confidences of that house would be open for disclosure to the Special Prosecutor—and thus ultimately to defendants—whenever one of 400 district judges chose not to accept the

551-585—74——6

President's claim of privilege.[51] Judge MacKinnon, in his dissent, in *Nixon* v. *Sirica*, 487 F. 2d 700, 752 (D.C. Cir. 1973), laid his finger on the pulse:

> But the greatest vice of the decision sought by the Special Prosecutor is that it would establish a precedent that would subject every presidential conference to the hazard of eventually being publicly exposed at the behest of some trial judge trying a civil or criminal case. It is this precedential effect which transforms this case from one solely related to the recordings sought here, to one which decides whether this President, and all future President, shall continue to enjoy the independency of executive action contemplated by the Constitution and fully exercised by all their predecessors.

[51] In *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973), the court emphatically stated, at 705: "The strength and particularity of this showing were made possible by a unique intermeshing of events, unlikely soon, *if ever*, to recur." It said at 722: "We end, as we began by emphasizing the extraordinary nature of this case. We have attempted to decide no more than the problem before us—a problem that takes its unique shape from a grand jury's compelling showing of need." Since that decision, the President has received more than two dozen subpoenas emanating from various courts throughout the country, calling for the production of voluminous amounts of privileged materials. Indeed, the crippling effect on the Executive Branch, generated by that decision, was correctly predicted by Judge MacKinnon in his dissent. Thus, the impairment of the Executive function is no longer just an unverified, theoretical proposition. A further denial of the President's claim of privilege, as asserted, can only foreshadow further destruction to the Office of the Presidency. As Justice Rehnquist recognized in *State of Michigan* v. *Tucker*, No. 73-482 (June 10, 1974): "The pressure of law enforcement and the vagaries of human nature would make such an expectation [no errors by policeman in investigating serious crimes] unrealistic."

B. THE RIGHT OF PRIVACY AND FREEDOM OF EXPRESSION SUPPORT THE ABSOLUTE CONFIDENTIALITY OF PRESIDENTIAL COMMUNICATIONS WITH HIS ADVISERS

The President's sole discretion to decide what presidential communications he will disclose, and to control the circumstances of disclosure, is independently grounded in the right of privacy[52] and the constitutionally protected freedom of expression[53] possessed by the President, his advisers and others with whom he confers in the course of carrying out his official responsibilities. The relationship among these "rights" was summarized by Judge Wilkey, dissenting in *Nixon* v. *Sirica*, 487 F. 2d 700, 767 (D.C. Cir. 1973):

> Certainly the Chief Executive's right to be fully, frankly, and confidentially informed is equal to that of any other citizen in the land; his need is undeniably greater. To breach his privacy would unquestionably have a 'chilling effect' on those who otherwise would counsel and confide in the President with complete candor and honesty.

[52] See *Griswold* v. *Connecticut*, 381 U.S. 479, 483–484 (1965), wherein Justice Douglas etched these words:

> In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion.
> * * * * *
> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.

[53] Article II, section 2, clause 1, of the Constitution, states, in part:

> [H]e may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.

In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) this Court acknowledged the broad scope of the First Amendment rights when it held immune from Sherman Act prosecution the attempts of railroads to influence legislation, the enforcement of laws, and the exercise of the veto power by the Governor of Pennsylvania, even though the railroads' efforts had been conducted fraudulently, unethically, and with an intent to injure or destroy competitors. This Court's interpretation of the Act was influenced heavily by the realistic assessment that the effective functioning of representative government depends on the most generous support for First Amendment values. Justice Black, for a unanimous Court, stated that application of the Sherman Act to the conduct in question—

> would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. (365 U.S. at 137).

The Court, therefore, refused to find that

> the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes * * *. (365 U.S. at 137).

In *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (1958), this Court quashed Alabama's discovery attempt to obtain N.A.A.C.P.'s membership lists,[54] thus preserving the organization from the "chilling effect" that disclosure would have wrought. The court emphasized:

> that the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment. And we conclude that Alabama has fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have. (357 U.S. at 466).

See also *Dombrowski* v. *Pfister*, 380 U.S. 479, 488–489 (1965).

As illustrated by the *Noerr* and *N.A.A.C.P.* cases, the problem of protecting political communications and the right of petition is a recurring issue involving a wide variety of factual settings. The ramifications for the effective functioning of the Presidency are of course virtually endless. Congressmen or their staff members must be able to give the President candid assessments of the political situation in the country, including the likely reactions of the House of Rep-

[54] Alabama's objective was to ensure compliance by the N.A.A.C.P. with the state's corporate registration laws, an objective uncontested by the N.A.A.C.P. The N.A.A.C.P.'s objection was to the *means* to obtain the end.

resentatives and the Senate to legislative proposals and to suggested presidential action. A legislator may wish to urge a course of action as wise, while warning that in a legislative battle he could not be counted on because of pressure from his constituents. Private persons and groups, too, may come to present points of view, offer support, warn of political retaliation, or suggest trade-offs. Contemporaneous memoranda prepared by or for the President and designed to preserve the details of such meetings are a vital part of the working and historical record. Knowledge that such records might be made public, under compulsion, in a future litigation would not only inhibit the expression of opinion but would dry up sources of indispensable information. The President would be denied the raw materials he needs to function effectively and responsibly.

The other side of this coin is that unless a President has the power to protect records of his private conversations from public disclosure, he himself would be seriously fettered. He would be less likely to seek out a broad range of advice and advisors; he would be constrained in his discourse or disabled from maintaining a record of his actions and conversations. Instead of concerning himself solely with shaping policy, a President would be driven to striking poses for the record, for history, or for his own personal protection.

C. THE JUDICIAL BRANCH CANNOT COMPEL PRODUCTION OF PRIVILEGED MATERIAL FROM THE PRESIDENT

The doctrine of the separation of powers embodies the concept that each branch is independent of the others, except where some form of interaction flows

from the regular operation of the government or where the Constitution or statutes explicitly provide to the contrary. The doctrine necessarily includes the right of the holder of the privilege to decide when it is to be exercised. It means, in this case, that compulsory process cannot issue against the President.

Chief Justice Taft in *Myers* v. *United States,* 272 U.S. 106, 116 (1926), provided the classic judicial statement of one separation of powers doctrine:

> Montesquieu's view that the maintenance of independence as between the legislative, the executive and the judicial branches was a security for the people had [the Framers'] full approval. Madison in the Convention, 2 Farrand, Records of the Federal Convention, 56 *Kendall* v. *United States,* 12 Pet. 524, 610, 9 L. ed. 1181, 1215. Accordingly the Constitution was so framed as to vest in the Congress all legislative powers therein granted, to vest in the President the executive power, and to vest in one Supreme Court and such inferior courts as Congress might establish the judicial power. From this division on principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires. Madison, 1 Annals of Congress, 497. This rule of construction has been confirmed by this court in *Meriwether* v. *Garrett,* 102 U.S. 472, 515, 26 L. ed. 197, 205; *Kilbourn* v. *Thompson,* 103 U.S. 168, 190, 26 L. ed. 377, 386; *Mugler* v. *Kansas,* 123 U.S. 623, 662, 8 S. Ct. 273, 31 L. ed. 205, 210.

Although the specific holding of the *Myers* case was narrowed to some extent in *Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935), that narrowing was on a point that does not bear on the present issue. The later case was at pains to reaffirm the vigor with which the constitutional separation of powers must be protected and preserved. Justice Sutherland, writing for a unanimous Court, said:

> The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the power of these departments by the Constitution; and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. (295 U.S. at 629–630).

The President's assertion of his privilege as a functioning of his role as the head of an independent branch of government is supported by the basic case law. In *Marbury* v. *Madison, 1 Cranch* (5 U.S.) 137 (1803), William Marbury, a Federalist and recipient of a "lame duck" judicial appointment, i.e., justice of the peace, from President John Adams in the post-election days of 1800, sought, in early 1801, to secure from James Madison, the new Secretary of State under President Jefferson, the actual commission of his appointment. When Madison declined, Marbury

sought mandamus relief in the Supreme Court pursuant to Section 13 of the Judiciary Act of 1789. On February 24, 1803, after a fourteen month "recess," Chief Justice John Marshall, a fellow Federalist, denied all relief, holding that although only a ministerial duty on Madison's part was involved, the statute bestowing the judicial power on the Supreme Court in such a case was unconstitutional.[35] In the course of ascertaining whether the particular factual situation excluded Marbury from obtaining legal redress, the Chief Justice examined the relationship between the official position of the defendant and the nature of his act. Significantly, he stated:

> By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use to his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.
>
> In such cases their acts are his acts; and *whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power*

[35] M. R. Cohen, *The Supreme Court in United States History,* 178–180 (1946) states that Marshall's decision was motivated by fear of impeachment from the newly-elected Republican Congress. Charles Warren, *The Supreme Court in United States History* 206–265 (1922), indicates the Republicans had been incensed at Adams' post-election appointments. This controversy eventually led to the fourteen month involuntary recess of the Court.

> *to control that discretion.* The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, *the decision of the executive is conclusive.* 1 Cranch (5 U.S.) at 165 (emphasis added).

The exchange between the Chief Justice and Mr. Lincoln, the Attorney General, during the hearing of the case foreshadowed his decision:

> The questions being written, were then read and handed to him. He repeated the ideas he had before suggested, and said his objections were of two kinds.
>
> 1st. He did not think himself bound to disclose his official transactions while acting as secretary of state; and, 2d. He ought not be compelled to answer any thing which might tend to criminate himself.
>
> Mr. Lincoln thought it was going a great way to say that every Secretary of State should at all times be liable to be called upon to appear as a witness in a court of justice, and testify to facts which came to his knowledge officially. He felt himself delicately situated between his duty to this court, and the duty he conceived he owed to an executive department; and hoped the court would give him time to consider of the subject.
>
> The court said that if Mr. Lincoln wishes time to consider what answers he should make, they would give him time; but they had no doubt he ought to answer. *There was nothing confidential required to be disclosed. If there had been he was not obliged to answer it; and if he thought that any thing was communicated to him in confidence he was not bound to disclose it;* nor

> was he obliged to state any thing which would criminate himself; but that the fact whether such commissions had been in the office or not, could not be a confidential fact; it is a fact which all the world have a right to know. 1 Cranch (5 U.S.) at 143–145. (emphasis added.)

Four years later, the *Burr* cases [56] came before Chief Justice Marshall. Three subpoenaes *duces tecum, in toto,* were sought and issued during the course of the intensely-contested trials, although only two were directed to President Jefferson. The first was requested on June 11, 1807, by Colonel Burr to obtain an October 21, 1806, letter from Colonel Wilkinson to the President, and two military orders, thought to be exculpatory on charges raised by a possible treason indictment. Following more than two days of argument on whether the Court had the right, under the circumstances of the case, to issue a subpoena against President Jefferson, the Chief Justice found that it ought to issue. The Court confined its inquiry to the narrow question of whether a subpoena should issue, and not to whether the court could or would compel actual compliance.[57] The Chief Justice said:

---

[56] *United States* v. *Burr*, 25 Fed. Cas. 30, No. 14692d (C.C.D. Va. 1807); *United States* v. *Burr*, 25 Fed. Cas. 187, No. 14694 (C.C.D. Va. 1807).

[57] The cautious reference to the *Burr* ruling in *Branzburg* v. *Hayes*, 408 U.S. 665, 689 n. 26 (1972), goes no further than to note that Chief Justice Marshall had "opined" that a subpoena might issue. In *Branzburg*, itself, this Court recognized that ordinarily a grand jury has the right to every man's evidence, but immediately qualified that statement by adding "except for those persons protected by a constitutional, common-law, or statutory privilege." *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972).

> If then, as is admitted by the counsel for the United States, a subpoena may issue to the President the accused is entitled to it of course; and whatever difference may exist with respect to the power to compel the same obedience to the process, as if it had been directed to a private citizen, there exists no difference with respect to the right to obtain it. The guard, furnished to this high officer, to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstances which is to precede their being issued. (25 Fed. Cas. at 34).

As best as can be determined from an ambiguous history, President Jefferson never complied with that subpoena. President Jefferson did transmit to the United States Attorney, George Hay, certain records from the offices of the Secretaries of the Army and Navy that were covered by the subpoena. This was done, however in apparent ignorance of the fact that the subpoena had issued because his transmittal letter contains a well-stated argument why a subpoena should not issue, 9 Ford, *Writings of Jefferson* 56–57 (1899). President Jefferson did not transmit the described letter from General Wilkinson, although that document was specifically designated by the subpoena. It appears Burr was forced to trial for treason without the benefit of the letter, for on the convening of his subsequent trial for misdemeanor on September 3, 1807, he again demanded that letter, and another.

If President Jefferson did fully comply with that first subpoena, this is unknown to Marshall's biographer. See 3 Beveridge, *The Life of John Marshall* 518–522 (1919). The letters called for were not produced and Colonel Burr asserted that the President was in contempt of court, since a subpoena was outstanding. Jefferson was nervous about what Chief Justice Marshall might do, and threatened to use force against the execution of the process of the court. A subpoena *duces tecum* then issued against Hay, who had one of the letters Colonel Burr was seeking. Hay produced a part of the letter but refused to give passages that the President deemed confidential. After Mr. Hay made his return, unsatisfactory to Mr. Burr, Chief Justice Marshall, noting that the President had not personally assigned any reasons for nonproduction of the item sought, cautiously opined that the President could not lawfully delegate to his attorney presidential discretion concerning what matters required continued secrecy and ordered that the letter be produced.[58] Five days later, President Jefferson

[58] One writer has asserted that "in fact [Jefferson] *fully complied* with the subpoena." Berger, *Executive Privilege* v. *Congressional Inquiry*, 12 U.C.L.A. L. Rev. 1043, 1107 (1965) (emphasis in original). The author's footnote at that point, however, fails to support the statement in the text. Indeed, that same writer has retreated, since then, from his earlier categorical position. He now says: "In fact Jefferson went a *long way* toward full compliance." R. Berger, *Executive Privilege: A Constitutional Myth* 188 (1974). See 60 A.B.A.J., Irwin Rhodes, *What Really Happened to the Jefferson Subpoenas* 52 (January, 1974) for an additional, contemporary analysis of the *Burr* cases, which concludes: "It is eminently clear that President Jefferson never submitted the contents of the withheld material to the Court or Burr and that his claim to an exclusive exercise of executive privilege, unreviewed by the courts, was upheld by Chief Justice Marshall." (At 54).

responded with his certificate and the letter, "excepting such parts as he deemed he ought not to permit to be made public." *United States* v. *Burr*, 25 F. Cas. 187, 193 No. 14,694 (C.C.D. Va. 1807). As Beveridge relates it:

> A second subpoena *duces tecum* seems to have been issued against Jefferson, and he defiantly refused to "sanction a proceeding so preposterous," by "any notice" of it. And there this heated and dangerous controversy appears to have ended. *Id.* at 522.

At this point, Beveridge adds in a footnote:

> For some reason the matter was not again pressed. Perhaps the favorable progress of the case relieved Burr's anxiety. It is possible that the "truce" so earnestly desired by Jefferson was arranged. *Id.* at 522 n. 4.

Other historians have read the evidence the same way. Rossiter expresses doubt whether Jefferson was a great President but thinks that one act that remains "to his lasting credit" was his "first declaration of presidential independence in his rejection of Marshall's subpoena in the Burr trial." Rossiter, *The American Presidency* 70 (1956). At another point Rossiter says:

> Jefferson's rejection of Marshall's subpoena *duces tecum* in the Burr trial and Chase's opinion in *Mississippi* v. *Johnson* (1867), which spared Andrew Johnson the necessity of answering a writ of injunction, make clear that the judiciary has no power to enjoin or mandamus or even question the President. *Id.* at 39.[59]

[59] Actually, in *United States* v. *Cooper*, 25 Fed. Cas. 631, 633, No. 14,865 (C.C. Pa. 1800), Justice Chase, sitting as a Circuit Justice, refused to direct a subpoena to President Adams stating that "it was a very improper and very indecent request." Cooper, *Account of the Trial of Thomas Cooper* 10 (1800).

The Court in *Mississippi* v. *Johnson* refuted the state's request to enjoin President Johnson from enforcing two Reconstruction Act statutes because "the duty thus imposed on the President (to see that the laws are faithfully executed) is in no sense ministerial. It is purely executive and political."[60] 4 Wall. (7 U.S.) at 499. The Court noted that the "fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained," 4 Wall. at 500, and summarized the thrust of the case in these terms:

> It is true that in the instance before us the interposition of the court is not sought to enforce action by the Executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion.
>
> * * * * *
>
> The Congress is the Legislative Department of the government, the President is the Execu-

[60] See *Kendall* v. *United States* ex rel *Stokes*, 12 Pet. (37 U.S.) 524, 609 (1838), and *Nat'l. Treasury Employees Union* v. *Nixon*, 492 F. 2d 587 (D.C. Cir. 1974), for cases where purely ministerial duties were involved. While the courts are unable to compel a President to act or restrain him from acting, his act, when performed, is in proper cases subject to judicial review and disallowance. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).

> tive Department. Neither can be restrained in its action by the Judicial Department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.
> The impropriety of such interference will be clearly seen upon consideration of its possible consequences. 4 Wall. at 499–500).

Without exception, the basic precedents support our contention that it is for the President to decide whether to disclose confidential presidential communications, and that his discretion is not subject to judicial review. Otherwise, the "essential co-equality" of the three branches, as the Court described it in *Humphrey's Executor* v. *United States,* 295 U.S. 602, 630 (1935), would be ended, and we would have taken a long—and probably irreversible—step toward government by Judiciary. Today it would be the Presidency that would be lessened and crippled in its ability to function. Tomorrow it could be Congress, for if presidential privacy must yield to a judicial determination, it is difficult to think of any ground on which congressional privacy could continue to stand.[61]

D. AN ALLEGATION OF CRIMINAL ACTIVITY DOES NOT OVERCOME THE ASSERTION OF PRESIDENTIAL PRIVILEGE

Even if the Special Prosecutor were able to make an evidentiary showing that the requested conversations were in furtherance of an alleged criminal conspiracy,

[61] Some measure of congressional privacy would remain under the Speech or Debate Clause of Article I, Sec. 6, but it is clear that Congress has long claimed a right of privacy, based on separation of powers, that goes far beyond what is protected by the Speech or Debate Clause.

such a showing could not overcome a presidential assertion of executive privilege. Executive privilege, unlike the attorney-client privilege, the husband-wife privilege, and other personal and evidentiary privileges, is a constitutional privilege which runs to the benefit of the public, rather than to the benefit of a particular individual. *Kaiser Aluminum and Chemical Corp.* v. *United States,* 157 F. Supp. 939, 944 (Ct. Cl. 1958). Current case law supports the view that proof of criminality will allow the defeat of an assertion of individual privilege. *United States* v. *Aldridge,* 484 F. 2d 655, 658 (7th Cir. 1973).[62]

The issue of whether this Court should allow an allegation of criminality to defeat a presidential assertion of privilege should be reached only after thorough and careful consideration of the applicable constitutional principles. The separation of powers doctrine is obviously vital to this determination, since this Court's consideration of the issue must necessarily include the broadest logical extensions that could result from denying the validity of the privilege. The Special Prosecutor argued successfully to the district court

[62] It is interesting to note in *Aldridge* that the individual privilege was held to fail only after the government, by producing evidence *at trial,* has established a *prima facie* case that the defendants had been involved in both securities and mail-fraud. 484 F. 2d at 658. It would be incongruous to allow a pre-trial showing of a grand jury's determination developed in a non-adversary forum, namely, that the President had an undefined role in a conspiracy, to overcome a constitutional privilege vital to the separation of powers doctrine. To do so would give the individual privilege a preferred classification over a constitutional privilege.

551-585—74——7

that the public interest to be served by disclosure of presidential conversations is the interest in seeing that "a trial is based upon all relevant and material evidence relating to the charges." (Memorandum of the Special Prosecutor, May 10, 1974, at p. 24). This finite interest in one criminal case must be weighed against the public interest in preserving the Presidency as a co-equal branch of government. The district court's construction of the executive privilege should not be allowed to stand merely to satisfy the desire to insure that "a criminal trial [is] based upon *all* relevant and material evidence relating to the charges." (Memorandum of the Special Prosecutor, May 10, 1974, at 24.)

Executive privilege, inherent in the separation of powers doctrine, extends to an entire branch of government. It is not an individual privilege. The right of confidentiality of executive communications is not a right established for the personal benefit of any one President. Consequently, even an abuse of that right by a President should not affect the validity or vitality of the privilege. If a President abuses the privileges and powers of his office, the proper remedy is not to reduce the office, but to deal with the offense, and to do so in accordance with the Constitution, *Marbury* v. *Madison,* 1 Cranch (5 U.S.) 137, (1803); *Kendall* v. *United States* ex rel. *Stokes,* 12 Peters (37 U.S.) 524, 609 (1838).

The Framers of the Constitution were aware of the potential abuse by a President of a right or privilege accorded to his office. Nevertheless, it was made clear

that the privilege was not affected. Only two days before the adoption of the Constitution, the question of presidential abuse of power or personal involvement in criminal actions was discussed. To protect against a President who had committed treason from being able to pardon co-offenders, Gouvenor Randolph made a motion to except cases of treason from the presidential pardon power.[63] He argued that:

> The prerogative of pardon in these cases was too great a trust. The President may himself be guilty. The Traitors may be his own instruments. (2 *Farrand* 626–627).

In opposing the motion, James Wilson stressed the impropriety of limiting the applicability of a privilege accorded to the executive office because of the potential for abuse by an individual holding that office for a term. Should the officeholder be involved in the conspiracy, he argued, procedures were available in the Constitution other than the limitations or destruction of the privilege, that would deal with such abuse.

The Framers' rationale for not limiting the privileges and powers vested in the Presidency is equally applicable here. The right of confidentiality of the executive office, which has been recognized for the past 187 years, cannot be diminished, disregarded, or destroyed by the alleged criminal activities of the officeholder. Should any incumbent abuse the office,

[63] Describing the President's power to grant pardons, the United States Constitution, Art. II, section 2, clause 1, provides: ". . . he shall have the power to Grant Reprieves and Pardons for Offenses against the United States, except in cases of Impeachment."

the sole remedy is impeachment, not judicial limitations or exceptions to the privileges or rights vested in the Presidency itself. *Mississippi* v. *Johnson,* 4 Wall (71 U.S.) 475 (1867); *Marbury* v. *Madison,* 1 Cranch (5 U.S.) 137 (1803); *Ex Parte Grossman,* 267 U.S. 87, 121 (1925). An allegation of criminal involvement on the part of a President, therefore, does not affect the right of confidentiality which inheres in his office.

V. THE SPECIAL PROSECUTOR HAS FAILED TO DEMONSTRATE A UNIQUE AND COMPELLING NEED REQUIRED UNDER NIXON V. SIRICA TO OVERCOME A VALID CLIAM OF PRESIDENTIAL PRIVILEGE

As we have shown above, the assertion of privilege by a President is necessarily absolute and unreviewable. However, under different factual circumstances, in *Nixon* v. *Sirica,* 487 F. 2d 700 (D.C. Cir. 1973), the United States Court of Appeals for the District of Columbia Circuit held, that presidential conversations are "presumptively privileged," 487 F. 2d at 717, and may be overcome only by a "uniquely powerful showing," 487 F. 2d at 717, that the material subpoenaed was "critical," 487 F. 2d at 706, and contain[ed] evidence peculiarly necessary . . . for which no effective substitute is available. 487 F. 2d at 717.

A. PRIVILEGE GENERALLY

Thus, even if an evidentiary showing as required by Rule 17(c) had been made as to each of the requested items, the Special Prosecutor must demonstrate a unique and compelling need to overcome the privileged

nature of the materials. He has not done so, nor is he able to do so in this case. Although a party seeking production of material pursuant to Rule 17(c) may establish that the requested items are both relevant and evidentiary, a subpoena will not issue if the requested material is subject to a valid claim of privilege. In *Mackey* v. *United States,* 351 F. 2d 794, 795 (D.C. Cir. 1965), the court of appeals acknowledged the defense of "privilege" and held that "the government may be required to produce documents in its possession unless it makes a valid claim of privilege." Courts have long recognized that the public interest in maintaining state secrets of a diplomatic or military nature will override the interests in continuing litigation. See e.g. *Totten* v. *United States,* 92 U.S. 105, 107 (1875); *United States* v. *Reynolds* 345 U.S. 1, 11 (1953). The Judiciary has also responded to executive pleas to protect "intra-governmental documents reflecting * * * deliberations comprising part of a process by which governmental decision and policies are formulated." *Cary Zeiss Stiftung* v. *V. E. B. Carl Zeiss, Jena,* 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd on the opinion below, 128 U.S. App. D.C. 10, 384, F.2d 979, *cert. denied* 389 U.S. 952 (1967); *Kaiser Aluminum & Chemical Corp.* v. *United States,* 157 F. Supp. 939, 946 (Ct. Cl. 1958).

Similarly, in *Continental Oil Co.* v. *United States,* 330 F. 2d 347 (9th Cir. 1964), the existence of a valid claim of attorney-client privilege as to the various documents requested by a grand jury was sufficient alone to quash a subpoena *duces tecum.* See also

United States v. *White*, 322 U.S. 694, 699 (1944) (privilege against self-incrimination), *United States* v. *Jacobs*, 322 F. Supp. 1299 (C.D. Cal. 1971) (attorney-client privilege) and *United States* v. *Judson*, 322 F. 2d 460 (9th Cir. 1963) (privilege against self-incrimination). Moreover, if even a portion of a requested document is not subject to a valid claim of confidentiality, the privileged portions should nevertheless not be subject to disclosure by subpoena. Cf. *Magida* v. *Continental Can Co.*, 12 F.R.D. 74, 77 (S.D. N.Y. 1951).

B. APPLICABILITY OF EXECUTIVE PRIVILEGE

Under *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973), the same rationale for individual privileges is equally applicable to a valid claim of executive privilege. The peculiar circumstances of the decision in *Nixon* v. *Sirica* should be outlined in order to better understand the scope of the court's treatment of executive privilege. In that case, the Special Prosecutor's showing in support of a grand jury subpoena was held to be sufficient to overcome the assertion of executive privilege. The court observed: "[t]he strength and particularity of this showing were made possible by a unique interneshing of events unlikely soon, if ever, to recur." 487 F. 2d at 705. Based on sworn testimony before the Senate Committee investigating the Watergate incident and the testimony before the grand jury investigating the Watergate incident, the Special Prosecutor was able to demonstrate to the court's satisfaction that significant inconsistencies in the sworn testimony of presidential advisors relating to the con-

tent of conversations of these advisors raised a distinct possibility that perjury had been committed before the Senate Committee, and, perhaps, before the grand jury itself. 487 F. 2d at 705. This is the context in which *Nixon* v. *Sirica* must be read.

In that case, the court of appeals expressly "acknowledge[d] the longstanding judicial recognition of executive privilege," 487 F. 2d at 713, and agreed that the conversations involved were "presumptively privileged" 487 F. 2d at 717. The court noted that the presumption of privilege premised on the public interest in confidentiality may "fail in the face of the uniquely powerful showing made by the Special Prosecutor in this case." *Id.* at 713. Simple logic dictates, however, that if a presumption is not to be merely illusory, then a certain quantum of evidence is needed to overcome it. In this regard, the court stated that a claim of executive privilege is entitled to "great weight." 487 F. 2d at 715. Thus, the quantum of evidence to overcome the privilege must necessarily be even greater. It must at least be "uniquely powerful" since the court's holding in *Nixon* v. *Sirica* was premised on a "particularized showing of the grand jury's need for each of the several subpoenaed tapes," a need that both the District Court, 360 F. Supp. at 11 n. 7, and the majority of the court of appeals called "well documented and imposing." 487 F. 2d at 705.

It is important to recognize that the decision of the majority of the court of appeals in *Nixon* v. *Sirica* was based on the unique need of the grand jury, and not

that of a prosecutor in a post-indictment setting. Indeed, the special function of the grand jury was the predicate for the court's finding that the "presumption of privilege premised on the public interest in confidentiality must fail in the face of the uniquely powerful showing made by the Special Prosecutor in this case." 487 F. 2d at 717. The court said:

> The function of the grand jury mandated by the Fifth Amendment for the institution of federal criminal prosecutions for capital or other serious crimes, is not only to indict persons when there is probable cause to believe they have committed crime, but also to protect persons from prosecution when probable cause does not exist. As we have noted, the Special Prosecutor has made a strong showing that the subpoenaed tapes contain evidence peculiarly necessary to the carrying out of this vital function—*evidence for which no effective substitute is available.* (487 F. 2d at 717) (emphasis added).

The court of appeals continually reaffirmed this limitation of its holding by speaking in terms of the grand jury's access and emphasizing that "we limit our decision strictly to that required by the precise and entirely unique circumstances of the case." 487 F. 2d at 704. See also 487 F. 2d at 722.

The fundamental distinction between a grand jury's need for evidence and that of a prosecutor in a post-indictment setting is significant here. The Special Prosecutor's position in requesting information for trial is not analogous to, and indeed is essentially different from, that of a grand jury seeking "evidence critical to [its] decision as to whether and whom to indict."

487 F. 2d at 706. By the very nature of the grand jury's function, the scope of its need for evidence is much broader than that of a prosecutor in a post-indictment setting. The standards of relevancy and materiality are thus necessarily much narrower in a trial setting than that of a grand jury investigation. This undisputed fact was recognized in *Schwimmer* v. *United States,* 332 F. 2d 855 (8th Cir.), *cert. denied,* 352 U.S. 833 (1956) when the court stated. "[R]elevance and materiality necessarily are items of broader content in their use as to a grand jury investigation than in their use as to the evidence of a trial." 232 F. 2d at 862. The rationale for having this stricter standard at the trial stage was explained by the court *In Re Grand Jury Subpoena Duces Tecum,* 203 F. Supp. 575 (S.D.N.Y. 1961). "[B]ecause the grand jury may have to develop evidence for the first time, the requirements of relevance and materiality are certainly less strict on a grand jury investigation than at trial." 203 F. Supp. at 579. The district court in this case totally failed to address this distinction.

In *Nixon* v. *Sirica,* the Special Prosecutor was able to show that the nine tapes he requested "were each directly relevant to the grand jury's task" and they contained "evidence critical to the grand jury's decision as to whether and whom to indict," 487 F.2d at 706, "evidence for which no effective substitute is available." 487 F. 2d at 717. No such descriptions can be used to justify the Special Prosecutor's need in this case. There has been no allegation that the requested materials are essential or even necessary to

the trial. Nor has there been any attempt to demonstrate what relevant and admissible evidence is lacking that the subpoenaed material will fulfill. For all that is known, the material sought, to the extent that it may exist, may not contain any relevant evidence or the evidence it may contain may be wholly cumulative of matters than can be otherwise proved. In addition a large volume of evidence, both documentary and testimonial, is already available to the Special Prosecutor, including a very significant amount of material furnished him by the President.[64]

We submit that the public interest that would be served by disclosure in a post-indictment context is substantially less compelling than it is in a grand jury context, a rationale recognized by the court in *Schwimmer* v. *United States,* 232 F. 2d 855 (8th Cir.), *cert. denied,* 352 U.S. 833 (1956). The presumption of privilege remains the same in both contexts. However, after a grand jury's finding of probable cause, the prosecutor's ability to make a showing of compelling need for the production of evidence is greatly enhanced because of evidence already available to him. Thus, in a post-indictment setting his burden of showing compelling need must necessarily be greater and factually more difficult, if it is to overcome the presumption of privilege. This conclusion is further enhanced by the fact that the Special Prosecutor signed the indictment returned by the grand jury in this case, which indeed could not have been returned

[64] Subsequent to the issuance of this subpoena, the President made available voluminous transcripts of numerous privileged conversations regarding Watergate-related matters to both the Special Prosecutor and the general public.

without his assent. *United States* v. *Cox,* 372 F. 2d 167 (5th Cir.), *cert. denied,* 381 U.S. 935 (1965). Therefore, the Special Prosecutor must have been satisfied that sufficient competent evidence of criminality was available to warrant the proceeding to trial against the persons indicted. The need for additional incriminating evidence, even if the items presently sought were in fact evidentiary, is bound to be cumulative or corroborative—certainly not a clear and compelling necessity.

C. BALANCING TEST

The court of appeals in *Nixon* v. *Sirica,* in deciding whether to quash a grand jury subpoena *duces tecum,* indicated that "the application of executive privilege depends on a weighing of the public interest protected by the privilege against the public interests that could be served by disclosure in a particular case." 487 F. 2d at 716. The court also acknowledged, "[t]hat the President's special interests may warrant a careful judicial screening of subpoenas . . .," 487 F. 2d at 710, and if this "judicial screening" is to be meaningful, it must occur before a court engages in the balancing process. The court of appeals recognized this when it quoted with approval, the statement of Chief Justice Marshall in *United States* v. *Burr,* 25 F. Cas. 187, No. 14, 694 (C.C.D. Va. 1807):

> The President, although subject to the general rules which apply to others, may have sufficient motives for declining to produce a particular paper, and those motives *may be* such as to restrain the court from enforcing its production * * *. I can readily conceive that the

> President might receive a letter which it would be improper to exhibit in public * * *. The occasion for *demanding* it ought, in such a case, to be very strong and to be fully shown to the court before its production could be *insisted* on. 25 F. Cas. at 190–192. (emphasis in original) (487 F. 2d at 710).

Other cases also clearly demonstrate that in order for a court to balance countervailing public interest, the party seeking disclosure must make a threshold showing of compelling need or "uniquely powerful" need. In *United States* v. *Reynolds,* 345 U.S. 1 (1953), a case relied upon in *Nixon* v. *Sirica,* this Court stated:

> In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. *A fortiori,* where necessity is dubious, a formal claim of privilege . . . will have to prevail. (345 U.S. at 11).

At another point in *Reynolds* this Court stated:

> [W]e will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. *Id.*

This point is further illustrated by *Committee for Nuclear Responsibility, Inc.* v. *Seaborg,* 463 F. 2d 788, 792 (D.C. Cir. 1971). There the court held:

> Of course, the party seeking discovery must make a preliminary showing of necessity to warrant even *in camera* disclosure, . . .

Certainly, this well-documented principle supports the proposition that, before a court can even engage in balancing, the party seeking disclosure must show a compelling need to overcome a presumption of privilege. *Senate Select Committee on Presidential Campaign Activities* v. *Richard M. Nixon,* Slip Op. No. 74–1258 (D.C. Cir. May 23, 1974). Since that showing has not been made in this case, it was incumbent upon the district court to grant the President's motion to quash.

It is clear that the Special Prosecutor has failed to make the requisite showing of compelling need necessary to activate the balancing test. Nor has he made a sufficient showing to establish that each of the requested materials is relevant and admissible and that it is not an attempt to discover additional evidence already known. Therefore under well-established case law, the subpoena should have been quashed in all respects by the court below.

VI. AN INCUMBENT PRESIDENT CANNOT LAWFULLY BE CHARGED WITH A CRIME BY A GRAND JURY

A. THE PRESIDENT CANNOT BE INDICTED WHILE HE IS SERVING AS PRESIDENT

It has never been seriously disputed by legal scholars, jurists, or constitutional authorities that a President may not be indicted while he is an incumbent. The reasons for the President's non-indictability bear

directly on the question of whether he may be named as an unindicted co-conspirator by a grand jury. The reasons are obvious and compelling. They are particularly relevant in light of the ongoing proceedings in the House of Representatives.

The Presidency is the only branch of government that is vested exclusively in one person by the Constitution. Art. II, section 1, clause 1 states:

> The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four years
> * * *

Article II then details the powers and functions that the President shall personally have and perform. The functioning of the executive branch ultimately depends on the President's personal capacity: legal, mental and physical. If the President cannot function freely, there is a critical gap in the whole constitutional system established by the Framers.

The President, personally, as no other individual, is necessary to the proper maintenance of orderly government. Thus, in order to control the dangerous possibility of any incapacity affecting the President, and hence the executive branch, the Constitution specifically limits and provides for all those events that could incapacitate a President.[65]

The necessary reason for the great concern and specificity of the Constitution in providing for a President at all times capable of fulfilling his duties,

[65] U.S. Const., Amend. 25, ratified on February 23, 1967. See Congressional Research Service, United States Congress, *The Constitution of the United States* at 42–43.

is the fact that all three branches of government must have the capacity to function if the system is to work. While the capacity to function is assured to the legislative and judicial branches by the numbers of individuals who comprise them, the executive branch must depend on the personal capacity of a single individual, the President. Since the executive's responsibilities include the day-to-day administration of the government, including all emergency functions, his capacity to function at any hour is highly critical. Needless to say, if the President were indictable while in office, any prosecutor and grand jury would have within their power the ability to cripple an entire branch of the national government and hence the whole system.

Further analysis makes it even more clear that a President may not be indicted while in office. The President is vested under Art. II, section 3, clause 1, with the power "that the Laws be faithfully executed" and he has under Art. II, section 2, clause 1, the power of granting "Pardons for Offenses against the United States, except in Cases of Impeachment." Under that same clause, he shall appoint the "Judges of the Supreme Court" with "the Advice and Consent of the Senate." The President has also been granted by Congress the same power to appoint all Article III judges. 28 U.S.C. 44 and 28 U.S.C. 133. Since the President's powers include control over all federal prosecutions, it is hardly reasonable or sensible to consider the President subject to such prosecution. This is consistent with the concept of prosecutorial discre-

tion, the integrity of the criminal justice system or a rational administrative order. This is particularly true in light of the impeachment clause which makes a President amenable to post-impeachment indictment. Art. I, section 3, clause 7. This clause takes account of the fact that the President is not indictable and recognizes that impeachment and conviction must occur before the judicial process is applicable to the person holding office as President. This section reads: "But the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." While out of necessity an incumbent President must not be subject to indictment in order for our consitutional system to operate, he is not removed from the sanction of the law. He can be indicted after he leaves office at the end of his term or after being "convicted" by the Senate in an impeachment proceeding.

The history surrounding the Constitution's adoption further makes it clear that impeachment is the exclusive remedy for presidential criminal misconduct. A very revealing interchange took place on September 15, 1787, only two days before the final adoption of the Constitution. Gouverneur Randolph moved to except cases of treason from the power of the President to pardon offenses against the United States, a power granted by Art. II, section 2, clause 7.

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.

There are several relevant considerations that should be noted about the Convention and the provision that resulted from them. First, it is clear that an incumbent President is not subject to criminal prosecution. He is amenable to the criminal laws, but only after he has been impeached and convicted, and thus stripped of his critical constitutional functions.

The text of Art. I, section 3, clause 7, points so explicitly in that direction that it hardly requires exposition, and the legislative history is wholly in accord. James Wilson noted that if the President himself be a "party to the guilt he can be impeached and prosecuted." 2 *Farrand* 626. And on September 4, 1787, in the recurring debate on whether impeachments should be tried by the Senate or by the Supreme Court, Gouverneur Morris said:

> A conclusive reason for making the Senate instead of the Supreme Court the Judge of Impeachments, was that the latter was to try the President after the trial of the impeachment. 2 *Farrand* 500.

The decision to make the Senate, and not the Supreme Court,[66] the ultimate body to decide upon the Presi-

[66] In this respect Gouverneur Morris noted:

> [N]o other tribunal than the Senate could be trusted [to try the President]. The Supreme Court were too few in number and might be warped or corrupted. He was agst. [sic] a dependence of the Executive on the Legislature, considering the Legislative tyranny the great danger to be apprehended; but there could be no danger that the Senate

dent's removal, further argues for limiting any court or grand jury from removing a President by way of indictment or other judicial process.

There is literally nothing in all of the records of the Convention to suggest that any delegate had any contrary view. This reading of the language in question was put forward twice by Hamilton when he wrote:

> The punishment which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law. *The Federalist,* No. 65, at 426 (Modern Library ed. 1937).

He returns to the point in the 69th *Federalist,* and uses it there to illustrate an important distinction between a President and a king.

> The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law. The person of the King of Great Britain is sacred and inviolable; there is no constitutional tribunal to which he is amenable; no punishment to which he can be subjected without involving the crisis of a national revolution.

---

would say untruly on their oaths that the President was guilty of crimes or facts, especially as in four years he can be turned out. *2 Farrand 551.*

So far as we are aware, that an incumbent President is not indictable is a proposition that has never been challenged by the Special Prosecutor. The proposition is relevant here because of the suggestion that an otherwise valid claim of privilege by the President should be overridden if there is in some manner an alleged showing of a *prima facie* criminal case or a *prima facie* finding of criminal involvement, such as the authorizing of the naming, or the naming of the President as an unindicted co-conspirator. If, however, such facts were true, which they are not, they go not to the evidentiary needs of the grand jury, but to those of the Committee on the Judiciary in the House.

Whatever the grand jury may claim about a President, its only possible proper recourse is to refer such facts, with the consent of the court, to the House and leave the conclusions of criminality to that body which is constitutionally empowered to make them. The grand jury may not indict the President or allege that there is probable cause to find criminal liability on the part of a President. Thus, such a claimed "finding" by the grand jury has no force in overcoming any presidential claim of privilege, as it is a legal nullity, being constitutionally impermissible.

A second important theme that runs through the debates of the Constitutional Convention of 1787 is whether the President should be answerable, in an impeachment proceeding, to the courts or to the Senate. On June 13, 1787, the Committee of the Whole adopted a resolution offered by Messrs. Randolph and Madison to give the national Judiciary jurisdic-

tion of "Impeachments of any national officers." 1 *Farrand* 224. On July 18th, however, the Convention voted unanimously to remove the language giving the courts jurisdiction of impeachments. 2 *Farrand* 39. This did not end the matter. The report of the Committee on Detail, on August 6th, would have given the Supreme Court original jurisdiction "in cases of impeachment." 2 *Farrand* 186. As noted above a subsequent committee, however, recommended on September 4th that the trial of impeachments be by the Senate, 2 *Farrand* 493. This was approved on September 8th by a vote of nine states to two. 2 *Farrand* 547. See the report of the debate on this issue at 2 *Farrand* 551–553.

The significance of the foregoing history is that it is not mere chance or inadvertence that the President is made answerable to the Senate, sitting as a Court of Impeachment. The Framers repeatedly considered making him answerable to the Judiciary, and they twice rejected proposals to this effect, thus further reinforcing the conclusion that it would be wholly inconsistent with the Framer's intent to hold a President indictable.

Finally, it should also be observed that there was no sentiment in the Convention for providing restraints other than impeachment against a President. The argument went quite the other way. There was sentiment in the Convention that a President would not be subject even to impeachment and that it would be enough that he served for a limited term and would answer to the people if he chose to stand for reelection. This point was extensively debated on July 20,

1787, with the motion to strike out the impeachment provision offered by Charles Pinckney and Gouverneur Morris, 2 *Farrand* 64–69. The arguments in favor of the Pinckney motion seem unpersuasive, and in fact during the course of the debate on it, Morris admitted that the discussion had changed his mind. But the debate is interesting because those who opposed the Pinckney motion, and supported retention of impeachment, made it clear that this was the only means by which they considered that the President was subject to law. Thus, Colonel George Mason said:

> No point is of more importance than that the right of impeachment should be continued. Shall any man be above Justice? Above all shall that man be above it, who can commit the most extensive injustice? When great crimes were committed he was for punishing the principal as well as the Coadjutors. (2 *Farrand* 65).

And again Eldridge Gerry—

> urged the necessity of impeachments. A good magistrate will not fear them. A bad one ought to be kept in fear of them. He hoped that maxim would never be adopted here that the Chief Magistrate could do no wrong. (2 *Farrand* 66).

By a vote of eight states to two, the Pinckney motion was defeated and the Convention agreed that the Executive should be removable on impeachment. 2 *Farrand* 69. But it is only conviction in the Senate that leads to this result. On September 14th, the Convention rejected, by a vote of eight states to three, a proposal that an officer impeached by the House be suspended from office until tried and acquitted by the Senate. 2 *Farrand* 612–613.

This examination of the proceedings of the Constitutional Convention of 1787 establishes that the Framers deliberately chose one particular means of guarding against the abuse of the powers they entrusted to a President. He may not be indicted unless and until he has been impeached and convicted by the Senate. Impeachment is the device that ensures that he is not above justice during the term in office, and the trial of impeachment is left to the Senate and not to the courts.

Those principles have been recognized by this Court. In the early and leading case of *Marbury* v. *Madison* 1 Cranch (5 U.S.) 137, 165 (1803), the Court said:

> By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.

Thirty-five years later, in *Kendall* v. *United States ex. rel. Stokes,* 12 Pet. (37 U.S.) 524, 610 (1838) the Court said:

> The executive power is vested in a President and as far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode prescribed by the Constitution through the impeaching power.[67]

[67] See also the observations in 1 Bryce, *The American Commonwealth* 89 (1889):

> The President is personally responsible for his acts, not indeed to Congress, but to the people, by whom he is chosen. No means exist of enforcing this responsibility, except by impeachment, but as his power lasts for four years only, and is much restricted, this is no serious evil.

We are wholly mindful of weighty warnings against the view that "the great clauses of the Constitution must be confined to the interpretation which the Framers, with the conditions and outlook of their time, would have placed upon them. . . ." *Home Building & Loan Assn.* v. *Blaisdell.* 290 U.S. 398, 443 (1934). But if the provisions of the Constitution that we have been discussing can fairly be said to have taken on new meaning with the passage of years, and with the emergence of new problems, surely any change must be in the direction of strengthening the independence of the Presidency, rather than creating new hobbles on it.

Powell v. *McCormick,* 395 U.S. 486 (1969), reaffirms the extraordinary nature and strictly limited character of the power to remove political officials, particularly those directly elected by the people. That decision held that the Congress could not expand the constitutional limits mandated for expelling or alternatively excluding a Congressman from his seat. U.S. Const., Article I, section 5, clause 2; Article I, section 2, clause 2. The constitutional sanctity of the people's electoral choice, therefore, was considered so important that it required judicial intervention and protection. While judicial action was required in *Powell* to protect the electorate's rights under the Constitution, the reverse is certainly not true. This same power cannot be used to nullify the electorate's decision. This is particularly true in the case of the Presidency when the Constitution explicitly delegates the power to remove the President under strict conditions to the representatives of the voters who elected him. It seems improbable, at best, to suggest that the Framers

felt that any court and grand jury could also remove or even legally incapacitate the Chief Executive. The specificity and grave nature of the impeachment process and the total absence of any discussion of any other method, is an extremely powerful argument for the exclusivity of impeachment as the only method of removing a President.

The *Powell* case emphasizes that while another branch cannot control the Congress in the execution of their peculiar constitutional responsibilities, neither can the Congress, as a whole, control the execution of a particular Congressman's duties via exclusion. Exclusion is an action that the Congress may take solely within the limits of Article I, section 2, clause 2. It is not a political tool. Obviously this also applies to the executive branch. If Congressman Powell could not be excluded from his congressional seat by a majority of Congress except by adhering to the requirements of the Constitution, then surely the Chief Executive may not be deprived of his ability to control decisions in the executive branch by a member of the executive department, unless the President has specifically delegated this authority to him. Nor can such an employee control the President through judicial or criminal process.

The decision in *Powell* is also harmonious with the long established principle that the Judiciary may prevent other branches from overstepping their constitutional bounds of responsibility. *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137 (1803). In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), this Court

made a similar determination that certain actions taken by the executive branch were beyond the scope of the constitutional duties mandated to the branch. If the Judiciary had determined that seizing the steel mills had been within the powers the Constitution and the laws had entrusted to the President, clearly it could not have forced the President to exercise his discretion and seize the mills. Although the Supreme Court has ruled innumerable laws unconstitutional over the last 187 years it has never once mandated that either Congress exercise its descretion to pass a law or the Executive prosecute an individual. The reasons are self-evident.

Today, in our nuclear age, far more than in George Washington's time, the nature of our country and of the world insistently requires a President who is free to act as the public interest requires, within the framework created by the Constitution. The whole Watergate problem has illustrated how truly complex the right decision can be. It is thus all the more necessary that a President have the ability to freely discuss issues, think out loud, play the devil's advocate, and consider alternatives, free from the threat that a probing statement will one day form the basis for an allegation of criminal liability.

B. THE GRAND JURY ACTION OF NAMING THE PRESIDENT AS AN UNINDICTED CO-CONSPIRATOR IS A NULLITY

The constitutional policy that mandates that the President is not subject to judicial process or criminal indictment while President, clearly shows that the grand jury action naming or authorizing the name of

the President as an unindicted co-conspirator contravenes the constitutional power of the grand jury or any court of this country.

The implication by a grand jury on the basis of certain alleged facts, that the President may have violated the law can have only one proper result. As stated above, the grand jury may with the district court's consent, forward the factual material creating the implications, minus any conclusions, to the House of Representatives.[68] That result was fulfilled when the grand jury filed with the court below its factual report and recommended that it be forwarded to the House Judiciary Committee, in March of 1974. The President made no objection to this move because the House of Representatives is the proper body, the only proper body, to impeach a President, as part of the process of removing a President from office. The grand jury's constitutionally impermissible authorization to the Special Prosecutor, permitting the President to be named or naming the President as an unindicted co-conspirator, however, attempts to subvert and prejudice the legitimate constitutional procedure of impeachment.

[68] This is the necessary implication of the grand jury's role, as a body with a limited mandate, as opposed to the House of Representatives whose political and constitutional mandate entitles them to consider whether in light of the President's complex responsibilities and political concerns a particular action or statement of his constitutes a crime. While any citizen may clearly express an opinion to his Congressman on the President's guilt, innocence or character, a grand jury, as an official part of our system of justice, with all that implies for its credibility and impact, may not.

In its opinion in *In Re Report and Recommendation of the June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives,* 370 F. Supp. 1219 (D.D.C. 1974), the district court convincingly demonstrated why the June 5, 1972, Grand Jury could not authorize the naming of the President as an unindicted co-conspirator. The very reasons why it was proper to refer the *Report and Recommendation to the House of Representatives* are those that argue against referring the naming or the authorization to name the President as an unindicted co-conspirator to that same body. In fact, these same considerations today require its expungement, because it is a legal nullity that continues to prejudice the President by its purported legal significance and apparent authority. The court below noted of the Report:

> The Report here at issue suffers from none of the objectionable qualities noted in *Hammond* and *United Electrical.* It draws no accusatory conclusions. It deprives no one of an official forum in which to respond. It is not a substitute for indictments where indictments might properly issue. ***It contains no recommendations, advice or statements that infringe on the prerogatives of other branches of government.*** Indeed, its only recommendation is to the Court, and rather than injuring separation of powers principles, the Jury sustains them by lending its aid to the House in the exercise of that body's constitutional jurisdiction. It renders no moral or social judgments. The Report is a simple and straightforward compilation of information gathered by the Grand Jury, and

no more. (370 F. Supp at 1226) (emphasis added).

As noted by the district court nothing could be more important to America's future than that the ongoing impeachment be "unswervingly fair." 370 F. Supp at 1230. And nothing could be more clear than that the naming of the President of the United States as an unindicted co-conspirator by a secret grand jury proceeding, which was subsequently leaked to the press, is a direct and damaging assault on the fairness of the House impeachment proceeding. It is the kind of prejudice that a court would certainly be required to remedy or compensate for if it affected the rights of a criminal defendant to a trial, free from the probability of prejudicial pre-trial publicity. *In Re Murchison,* 349 U.S. 133 (1955); *Estes* v. *Texas,* 381 U.S. 532 (1965); *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966).

This unauthorized action of the grand jury that has the appearance of official status, and presently the implicit approval of the lower court may well directly affect the outcome of the House procedure. Yet, the President has no legal recourse against the grand jury's action except with this Court. No petit jury, whose obligation is to find guilt "beyond a reasonable doubt" is empowered to adjudicate this charge against the President.[9]

The rigorous adversary format, with that most powerful tool for determining the truth, cross-examination, is not available in the secret grand jury

[9] While the President, as an individual, might some day vindicate himself before a petit jury, as long as he holds the office of President he could not be vindicated in a court of law.

setting. It is now well established that the right of cross-examination is an essential element of due process in any proceeding where an individual's "property" or "reputation" may be adversely affected.[10] The fundamental right to present evidence and to cross-examine witnesses in an impeachment proceeding is manifest. As the experience of our judicial system has demonstrated, the most effective method of establishing the truth of an accusation is to permit the respondent the right to personally cross-examine those presenting adverse testimony. The Supreme Court flatly states in *Greene* v. *McElroy,* 360 U.S. 474 (1959) that:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. We have formalized these protections in the requirements of confrontation and cross-

[10] *Goldberg* v. *Kelly,* 397 U.S. 254 (1970); *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1969); *Fuentes* v. *Shevin,* 407 U.S. 67 (1972); *Bell* v. *Benson,* 402 U.S. 535 (1971); Cf. *Board of Regents* v. *Roth,* 408 U.S. 564, 573 (1972) and *Wisconsin* v. *Constaintineau,* 400 U.S. 433, 437 (1971).

> examination. They have ancient roots. They find expression in the Sixth Amendment. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . action was under scrutiny. (360 U.S. at 496–497).

Justice Douglas in the concurring opinion in *Peters* v. *Hobby,* 349 U.S. 331 (1955), emphasized the necessity of permitting a respondent to cross-examine all adverse witnesses.

> Under cross-examination [witnesses] stories might disappear like bubbles. Their whispered confidences might turn out to be yarns conceived by twisted minds or by people who, though sincere, have poor faculties of observation and memory.
>
> Confrontation and cross-examination under oath are essential, if the American ideal of due process is to remain a vital force in our public life. We deal here with the reputation of men and their right to work—things more precious than property itself. We have here a system where government with all its power and authority condemns a man to a suspect class and outer darkness, without the rudiments of a fair trial. (349 U.S. at 351).

There is no way within our judicial system to disprove allegations made against a President. It is because of this and because of the vast impact of this purportedly official criminal implication and charge against a President, on the whole body politic, that the Constitution requires no less a body than the whole House of Representatives to find the President likely enough

to be guilty of criminal misconduct that he should be tried by the Senate.

The characterization of the President of the United States as an unindicted co-conspirator, is nothing less than an attempt to nullify the presumption of innocence by a secret, non-adversary proceeding. The presumption of innocence is a fundamental of American justice; the grand jury's procedure is an implication of guilt which corrupts this ideal. To thus allow the Special Prosecutor to use such a constitutionally impermissible device, as an incident to an evidentiary desire, for the purpose of overcoming executive privilege, is wholly intolerable. The American legal system has never allowed the desire for evidence to go beyond the bounds of law. *Boyd* v. *United States,* 116 U.S. 616 (1886); *Weeks* v. *United States,* 232 U.S. 383 (1914); *Silverthorne Lumber Company* v. *United States,* 251 U.S. 385 (1920); *Mapp* v. *Ohio,* 367 U.S. 643 (1961). The President should not be made a hostage of the unwarranted pressure inherent in the grand jury's improper action.

The former Special Prosecutor, Mr. Archibald Cox, was quoted in the *New York Times* on January 5, 1974, as dealing with this exact issue. In response to rumors that he would name the President as an unindicted co-conspirator the newspaper printed this:

> Mr. Cox, in the telephone interview from his vacation home in Maine, described such a technique as 'just a backhanded way of sticking the knife in.' *New York Times,* January 6, 1974, p. 1, col. 6; p. 40, col. 1.

A later issue of the *New York Times* dealt with the same basic questions when it stated:

> Leon Jaworski, the Watergate special prosecutor, advised the Federal Grand Jury investigating the Watergate break-in and cover-up that it would not be 'responsible conduct' to move to indict President Nixon, according to a spokesman for the office.
>
> Although Mr. Jaworski's advice to the Grand Jury did not refer to President Nixon by name—the matter was discussed in terms of a factual situation such as exists—it did include the suggestion that the House Judiciary Committee's impeachment inquiry was the proper forum to consider matters of evidence relating to a President.
>
> Although there had been speculation that Mr. Jaworski had tentatively concluded that legal complications militated against a move to indict the President, today's statement was the first direct confirmation of the fact. *New York Times,* March 12, 1974, p. 1.

It is only by impeachment and conviction and then subsequent criminal action that the President may be found to be a member of any criminal conspiracy. To base a desire for evidence on a stratagem which attempts to cripple the Presidency, and thus nullify the President's claim of executive privilege, is unprecedented, but more significantly a grotesque attempt to abuse the process of the judicial branch of government. Under our system of government only the House of Representatives may determine that evidence of sufficient quantity and quality exists to try the President. And, that trial must take place in the Senate with the Chief Justice presiding.

C. EVEN IF IT WERE PERMISSIBLE, THE NAMING OF AN INCUMBENT PRESIDENT AS AN UNINDICTED CO-CONSPIRATOR DOES NOT CONSTITUTE A PRIMA FACIE SHOWING OF CRIMINAL ACTIVITY

In the preceding section we have conclusively demonstrated why it is not constitutionally permissible to name an incumbent President as an unindicted co-conspirator. However, if such an act had been constitutionally permissible, it would nevertheless not have the effect of constituting a *prima facie* showing of criminality sufficient to overcome the President's constitutional claim of executive privilege.

There is a basic distinction between a finding of "probable cause" and the showing of a *"prima facie"* case which makes the Special Prosecutor's use of these two terms in the instant case both inaccurate and improper.

Probable cause is a legal concept based on the proposition that a crime "might" have been committed. As such it justifies an inquiry into an individual's guilt. It does not justify any legal effect that would operate to overcome either a presumption of innocence or executive privilege attaching to an otherwise valid claim. On the other hand, *prima facie* evidence is evidence sufficient to have a legal effect, which if unrebutted, is sufficient to go to a jury in a trial setting and sufficient to convict an individual of a crime before a petit jury. The finding of the grand jury at issue here has none of this sufficiency. It has never been tested in

551-585—74——9

any adversary forum and hence is insufficient to have any legal effect on the rights or privileges of anyone.

This elementary distinction was noted by the Court in *Locke* v. *United States,* 7 Cranch (11 U.S.) 339, 348 (1813):

> It is contended, that probable cause means *prima facie* evidence, or, in other words, such evidence as, in the absence of exculpatory proof, would justify condemnation.
>
> This argument has been very satisfactorily answered on the part of the United States by the observation that this would render the provision totally inoperative. It may be added, that the term "probable cause," according to its usual acceptation, means less than evidence which would justify condemnation; and, in all cases of seizure, has a fixed and well-known meaning. It imports a seizure made under circumstances which warrant suspicion. In this, its legal sense, the court must understand the term to have been used by Congress.

Nothing could make the legal objections to using a probable cause standard to overcome a valid claim of presidential privilege clearer, than this Court in *Brinegar* v. *United States,* 338 U.S. 160, 176 (1949), when it stated:

> The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.

The claim that the grand jury's action is sufficient to constitute a *prima facie* showing of criminality can be seen for what it is: an attempt to use a practical tool of law enforcement as a constitutional bludgeon to batter down the President's rights to due process and his fundamental right to be presumed innocent by the law. Recently this basic point was reaffirmed by the Court in *United States* v. *Ventresca,* 380 U.S. 102, 108 (1965), when in quoting *Brinegar,* this Court stated:

> There is a large difference between the two things to be proved [guilt and probable cause], as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them. (338 U.S. at 108).

The *prima facie* showing that the Special Prosecutor claims to have made can only have been made if the President of the United States is to be tried and convicted by a grand jury! Thus the Special Prosecution's argument is a legal absurdity.

An indictment may be returned against an accused upon a grand jury's finding that the "evidence" constituted the existence of probable cause to believe the accused participated in criminal activity. It must always be remembered that this "evidence" is not the type of evidence that in a trial court goes to the question of guilt or innocence. It is not evidence that has ever been tested in an adversary forum, in which an opportunity would have been presented to explore its alternative inferences, to question its credibility by

cross examination, and to offer evidence which may rebut the original allegation. All that the evidence weighed by a grand jury can ever be said to show fairly is that there is probable cause to believe someone should be brought to trial. In the instant case, the grand jury could only find "probable cause" of criminal activity on the part of the President and nothing more, if it could even find that. Yet the Special Prosecutor says this finding of probable cause is a *"prima facie"* showing of criminality. *Prima facie* evidence of a fact, however, is such evidence as will establish that fact in a court of law if not rebutted. *Lilienthal's Tobacco* v. *United States,* 97 U.S. 237, 268 (1877); *United States* v. *Wiggins,* 14 Pet. (39 U.S.) 334 (1840). It thus becomes obvious that in a grand jury setting, the kind of *prima facie* showing the Special Prosecutor talks about, cannot occur.

A grand jury finding of probable cause in most cases results in an indictment which is merely an accusation of criminal activity and is not evidence of criminality. In *United States* v. *Cummings,* 468 F. 2d 274, 278 (9th Cir. 1972), the Court of Appeals found serious error and reversed the judgment of the trial court because it allowed counsel for the government in closing argument to suggest that the return of an indictment by a grand jury was an indication of the guilt of the accused. In a criminal trial, the fact that a grand jury heard evidence and, based on that evidence, returned an indictment, does not allow inference of guilt. *United States* v. *Sutton,* 312 F. Supp. 969, 972 (D. Ariz. 1970), *aff'd* 446 F. 2d 916, 922 (9th

Cir. 1971), *cert. denied,* 404 U.S. 1025 (1972). In *Sutton,* the United States Attorney, in his summation, made reference to the fact that the proceeding was by indictment and that at least twelve people have to agree on the indictment after hearing evidence. This comment was objected to and the trial judge sustained the objection and, shortly thereafter, instructed the jury that the indictment is no evidence and it does not create any presumption or inference of guilt. 312 F. Supp. at 972. In this regard the court of appeals found that only the trial judge's timely actions prevented the United States Attorney's improper comment from prejudicing the appellant and eliminated any necessity for a mistrial. 446 F. 2d at 922. Likewise, only this Court's timely action in declaring the invalidity and improper character of the grand jury's action in this case will offset to some degree the prejudice to the President.

Jury instructions are frequently, if not always, used to inform a jury that an indictment is merely a formal method of accusing a defendant of a crime and is not evidence of any kind against the accused.[11] e.g. 1 Federal Jury Practice and Instructions, Devitt & Blackmar, § 11.02 at 208 (1970). Such instructions are universally accepted. See e.g., *Adjmi* v. *United States,* 343 F. 2d 164, 165 (5th Cir. 1965); *Black* v. *United States,* 309 F. 2d 331, 343 (8th Cir. 1962), *cert. denied,* 372 U.S. 934 (1963); *United States* v. *Senior,* 274 F. 2d 613, 617 (7th Cir. 1960). Therefore, since the grand

[11] A similar instruction is used when a charge is made by an information rather than an indictment.

jury's determination of probable cause is not evidence of guilt or criminality in a trial proceeding we submit that the court below was not and could not have been presented with a *prima facie* showing of criminality.

Moreover, in the instant case, even if the Special Prosecutor could, by some strange convolution of law and logic, make an evidentiary showing of criminality on the part of the President, it would still have been necessary for this "showing" to overcome three distinct presumptions in order to allow the trial court to rule properly that the conversations sought here are not privileged. These presumptions are (1) the presumed validity of a claim of executive privilege, (2) the presumption that every man is innocent until proven guilty, beyond a reasonable doubt, in a court of law, and (3) the presumption of regularity applied to the acts of a government official.

Besides the presumption of validity that is inherent in any presidential assertion of executive privilege, *Nixon* v. *Sirica,* 487 F. 2d 700, 715, 717 (D.C. Cir. 1973), there exists the presumption of innocence afforded to every man under the law. At the start of a trial, the law persumes an accused innocent with no evidence against him. *United States* v. *Agnew* 165 U.S. 36, 52, (1897); 9 *Wigmore On Evidence* § 2511 (3rd ed. 1940). The President, who is not even involved in a criminal proceeding, is certainly presumed innocent of criminal activity until a proper and sufficient evidentiary showing is made to demonstrate the contrary. Such a showing could only be made in an impeachment proceeding, followed by indictment, trial and conviction in a court of law. In any event, a secret, non-adversary grand jury proceeding, leaked to the public, can hardly cast any legal stones at the President's presumption of innocence. In the instant case, the Special Prosecutor has not made any evidentiary showing of criminality.

The final presumption that must be overcome in order for a judicial determination to be made that the subpoenaed conversations deal with criminal conduct is the presumption of regularity. The law presumes that government officials perform the requirements of legal conditions incumbent to their office. 9 *Wigmore On Evidence,* § 2534 (3rd ed. 1940). The President operates under the constitutionally imposed duty to see "that the Laws be faithfully executed." U.S. Const., Art. II, sec. 3. The presumption of regularity applied to the acts of the President, in the instant case, would require a presumption that, when the President converses with his aides, his action is proper and pertains to the performance of official duties imposed by law. See *F.C.C.* v. *Schreiber,* 381 U.S. 279, 296 (1965). (Administrative agencies of the government are entitled to the presumption that they will act properly and according to law.) The nature and scope of the President's constitutional mandate dictate that the quantum of evidence necessary to overcome the presumption of regularity indeed be substantial. Any other result would severely limit the President's ability to fulfill his wide discretionary responsibilities under the Constitution. Thus, the presumptions of a valid claim of executive privilege, innocence, and the

regularity of governmental activities present formidable barriers which the Special Prosecutor has not overcome, and which he certainly cannot overcome behind the closed doors of a grand jury proceeding.

VII. THE SPECIAL PROSECUTOR FAILED TO SATISFY THE REQUIREMENTS FOR A RULE 17(C) SUBPOENA

A. THE SPECIAL PROSECUTOR HAS FAILED TO DEMONSTRATE THAT THE MATERIALS SOUGHT WERE RELEVANT AND EVIDENTIARY

Before a determination can be made that the President's assertion of executive privilege has been overcome, the Special Prosecutor has the burden of proving that his subpoena meets the stringent requirements of Rule 17(c), Federal Rules of Criminal Procedure. The court below in its May 20, 1974, opinion and order reached the conclusion that the requirements of Rule 17(c) were met. Specifically, the court stated:

> It is the Court's position that the Special Prosecutor's May 10, 1974, memorandum correctly applies the Rule 17(c) standards particularly in the more unusual situation of this kind where the subpoena, rather than being directed to the government by defendants, issues to what, as a practical matter, is a third party. (*United States* v. *Mitchell*, Cr. No. 74–110, (D.D.C. filed May 20, 1974) at 5).

This determination of the court below is a conclusion, unsupported by any reference either to the specific requirements of Rule 17(c) or to how the Special Prosecutor's showing has satisfied these requirements. The Court's conclusion is apparently based on the Special Prosecutor's memorandum of May 10, 1974, and the court's finding that the President is a third party. The showing made in the memorandum of May 10, 1974 does not meet the strict requirements of Rule 17(c). Furthermore, the President is not to be judged as a typical third party in a judicial subpoena proceeding.

The Special Prosecutor sought this subpoena pursuant to Criminal Rule 17(c), which provides:

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

The leading case discussing Rule 17(c) is *Bowman Dairy Co.* v. *United States*, 341 U.S. 214 (1951). In *Bowman*, this Court plainly emphasized that "Rule 17(c) was not intended to provide an additional means of discovery." 341 U.S. at 220. On the contrary, its application was specifically limited only to production of "evidentiary" material. 341 U.S. at 219. In this regard this court stated, "[I]n short, any document or other material admissible as evidence . . . is sub-

ject to subpoena." 341 U.S. at 221. By utilizing this admissible evidence standard in applying Rule 17(c), this Court rejected a conclusory request by the defendants for materials that "are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants . . ." 341 U.S. at 221, a request that is quite similar to the one sustained by the court below. This Court considered such a "catch-all" request as invalid for it was "not intended to produce evidentiary materials but [was] merely a fishing expedition to see what may turn up." 341 U.S. at 221.

That all subpoenaed materials under Rule 17(c) must be both evidentiary in nature and relevant is uniformly required by the courts, which have recognized that Rule 17(c) is subject to abuse by parties seeking additional pretrial discovery. Consequently, courts have developed criteria that the party seeking a pretrial subpoena must meet before compliance will be ordered. In *United States* v. *Iozia,* 13 F.R.D. 335 (S.D.N.Y. 1952), Judge Weinfeld formulated the following criteria, which have been frequently cited by other courts:

> (1) That the documents are evidentiary and relevant;
>
> (2) That they are not otherwise procurable by the defendant reasonably in advance of trial by the exercise of due diligence;
>
> (3) That the defendant cannot properly prepare for trial without such production, and inspection in advance of trial and failure to obtain such inspection may tend reasonably to delay the trial;

> (4) That the application is made in good faith and is not intended as a general fishing expedition. 13 F.R.D. at 338."

As to the burden of establishing the validity of a subpoena *duces tecum,* controlling case law recognizes that it is incumbent upon the party seeking disclosure to set forth each request with sufficient specificity to establish that each document is both "relevant" and "admissible," and that the other *Iozia* criteria have been met. *United States* v. *Palermo,* 21 F.R.D. 11, 13 (S.D.N.Y. 1957). In this regard the court in *United States* v. *Winkler,* 17 F.R.D. 213 (D.R.I. 1955), held:

> [T]he right of a defendant to the production and inspection of documents and objects prior to trial under Rule 17(c) is not absolute but that upon objection thereto good cause for such production and inspection must be first shown by the party seeking the same. (17 F.R.D. at 215).

In *Iozia,* where the defendant sought a subpoena, the court held that "there must be a showing of good cause to entitle the defendant to production and inspection of documents under Rule 17(c)." 13 F.R.D. at 338. "Good cause" as defined by the *Iozia* court, requires a showing by the defendant [12] that all four of

---

[12] This case has been prominently cited in numerous decision. See for example, *United States* v. *Bearden,* 423 F. 2d 805, 810 n. 4, (5th Cir.), *cert. denied,* 400 U.S. 836 (1970); *United States* v. *Garrison,* 168 F. Supp 622, 624 (E.D. Wis. 1958); *United States* v. *Duncan,* 22 F.R.D. 295, 298 (S.D.N.Y. 1958).

[13] That the provisions of Rule 17(c) are applicable to the government as well as to a defendant is not open to serious challenge. See *United States* v. *Gross,* 24 F.R.D. 138, 140 (S.D.N.Y. 1959).

the criteria set out above have been met. In the court below there was not even a showing that the material sought "would be admissible in evidence or relevant at trial." See *United States* v. *Winkler*, 17 F.R.D. 213, 215 (D.R.I. 1955).

That the Special Prosecutor has failed to demonstrate that the materials requested are "relevant and evidentiary" is readily apparent from the record of the court below. The original Rule 17(c) motion was supported by the Special Prosecutor's affidavit and memorandum of May 10, 1974. At page two of this affidavit, the Special Prosecutor requested 64 presidential conversations on the bald assertion that each of these materials *"contains or is likely to contain* evidence that will be relevant to the trial of this case." (emphasis added). At page two of his memorandum of May 10, 1974, the Special Prosecutor, in an unsupported allegation, stated: *"In all probability,* many of the subpoenaed items will contain evidence which will be relevant and material to the trial . . ." (emphasis added). Thus, it is evident that the Special Prosecutor was unable to make the necessary showing that each of the requested 64 items was evidentiary. A general allegation that some or a majority of the material sought may be relevant or admissible is not sufficient under *Iozia* to establish that all requested items "are evidentiary and relevant." 13 F.R.D. at 338.

Moreover, even the general assertion made by the Special Prosecutor that some of the materials may be relevant is devoid of any meritorious factual support. As such, it was an unsupported allegation seeking discovery and Rule 17(c) may not be used for that purpose. It has been firmly established in criminal cases that in seeking discovery, the requirement of a showing of materiality and admissibility is not satisfied, "by a mere conclusory allegation that the requested information is material" to the preparation of a case. *United States* v. *Conder*, 423 F. 2d 904, 910 (6th Cir.), *cert. denied*, 400 U.S. 958 (1970). Nor is it sufficient to make a "bare allegation that the requested information would be material in the preparation of the defense." 423 F. 2d at 910.

From the Special Prosecutor's statements that the requested materials were "likely to contain evidence" and "in all probability" may contain evidence, it is readily apparent that he was attempting to seek evidence not already known. As the court definitively stated in *United States* v. *Frank*, 23 F.R.D. 145 (D.D.C. 1959), Rule 17(c) "does not permit blunderbuss inspection of the government's evidence in an attempt to learn something not known, it is not a discovery provision." 23 F.R.D. at 147. This same concept was reaffirmed by the court in *United States* v. *Gross*, 24 F.R.D. 138 (S.D.N.Y. 1959), when it stated *"the government* [cannot] use Rule 17(c) to obtain leads as to the existence of additional documentary evidence or seek information relating to the defendant's case." 24 F.R.D. at 141 (emphasis added). Any request designed merely to disclose additional evidence not already known has properly been termed a "fishing expedition," which will not be countenanced under this rule. *Bowman Dairy Co.* v. *United States*, 341 U.S. at 221. The Special Prosecutor is obviously

attempting to use Rule 17(c), contrary to established case law, to obtain additional evidence not already known.

In addition, the district court is noticeably silent to the teaching of *United States* v. *Marchisio,* 344 F. 2d 653, 669 (2d Cir. 1965), that a subpoena *duces tecum* in a criminal action is not intended for the purposes of discovery, and that the documents sought must at that time meet the test of relevancy and admissibility.

It is also important to emphasize that there is an essential distinction between disclosure in civil and criminal actions. *United States* v. *Maryland & Virginia Milk Producers, Inc.,* 9 F.R.D. 509 (D.D.C. 1949). In this regard it is interesting to note that contrary to the more limited criminal discovery provisions applicable here, the Special Prosecutor's request in this instance was very similar in both substance and tone to the broader civil discovery provisions of Rule 26 of the Federal Rules of Civil Procedure."

Additionally, it has been judicially recognized that the test to be met by one seeking material must be met

" Rule 26, F.R.C.P. provides, in part:

(b) SCOPE OF DISCOVERY. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) IN GENERAL. Parties may obtain discovery regarding any matter, *not privileged,* which is relevant to the subject matter involved in the pending action . . . It is not ground for objection that the information sought will be inadmissible at the trial if *the information sought appears reasonably calculated to lead to the discovery of evidence.* (emphasis added).

at the time that the items are sought, and the mere "probability" that the items may later become relevant is of no consequence. The court in *United States* v. *Marchisio,* 344 F. 2d 653 (2d Cir. 1965), stated: "Unlike the rule in civil actions, a subpoena *duces tecum* in a criminal action is not intended for the purpose of discovery; the documents sought must at that time meet the tests of relevancy and admissibility." 344 F. 2d at 669. See also *United States* v. *Murray,* 297 F. 2d 812, 821–822 (2d Cir. 1962); *United States* v. *Palermo,* 21 F.R.D. 11, 13 (S.D.N.Y. 1957).

Furthermore, in the Special Prosecutor's conclusion to the first section of his argument, he, in effect, urged the court below to allow him a lesser standard of relevancy and evidentiary showing when "seeking material from third parties the precise contents of which is unknown" (Special Prosecutor's memorandum, May 10, 1974, at 1, 10). This suggestion of a lesser standard than that required by Rule 17(c) case law is not as astonishing as the tacit implication that the Special Prosecutor does not know the contents of the material he is seeking. For without this knowledge, the Special Prosecutor cannot even hope to meet any of the *Iozia* criteria and is obviously on a "fishing expedition" or is attempting to use Rule 17 (c) as a discovery device.

It is also readily apparent that since the Special Prosecutor cannot show that the privileged conversations are relevant for the purpose for which he seeks them, he is attempting to formulate a new standard whereby the President should produce the recorded

conversations unless the President can establish to the satisfaction of the Special Prosecutor and this Court that the subpoenaed conversations are not relevant. This attempt to shift the burden of establishing relevancy from the party seeking material under Rule 17(c) to the party being subpoenaed is unsupported by any case law and flies in the face of established precedent. In this regard the court in *United States* v. *Winkler,* 17 F.R.D. 213 (D.R.I. 1955), held:

> The right of a defendant to the production and inspection of documents and objects prior to trial under Rule 17(c) is not absolute but that upon objection thereto good cause for such production and inspection must be first shown by the party seeking the same. (17 F.R.D. at 215).

As a further attempt to demonstrate admissibility, the Special Prosecutor proffers at pages 15–16 of his memorandum of May 10, 1974, that "statements made during conversations may be useful to the Government for the purpose of impreaching defendants Haldeman, Ehrlichman, and Colson should they elect to testify in their own behalf." The Special Prosecutor's suggestion that he is entitled to materials useful for impeachment conceals the fact that courts hold that impeachment materials cannot be obtained in advance of trial and one must wait to see if the person to be impeached actually testifies. *United States* v. *Carter,* 15 F.R.D. 367, 371 (D.D.C. 1954) (Holtzoff, J.); *United States* v. *Murray,* 297 F. 2d 812, 821–822 (2d Cir.) *cert denied,* 369 U.S. 828 (1962); *United States* v. *Brockington,* 21 F.R.D. 104 106 (E.D. Va. 1957); *United States* v. *Hiss,* 9 F.R.D. 515, 516–517 (S.D.N.Y. 1949).

In light of the lower court's conclusion that the President was, in essence, a third party, it should be noted that in criminal proceedings, because of the respective roles of the parties, it is much easier for a defendant to factually satisfy the *Iozia* requirements when seeking items from the government than it is for the government or defendant to do so against a third party. This is because a defendant may make conclusive statement as to relevancy and admissibility without knowing the precise nature of the materials. Prosecutors by presenting evidence to a grand jury and intending to use evidence at trial, necessarily classify such items as relevant and evidentiary. Thus, it follows that a defendant may utilize conclusive assertions regarding the quality of material he seeks. Obviously, the government does not have this same advantage of utilizing unsupported statements and must therefore justify in greater specificity the items it is seeking.

B. THE PRESIDENT SHOULD NOT BE JUDGED AS A "TYPICAL" THIRD PARTY.

The Special Prosecutor has attempted to ease his "relevant and evidentiary" burden under Rule 17(c) by pointing out at page 7 of his memorandum of May 10, 1974, that "in the instant case the Government seeks to obtain evidentiary items from a third party." The President, however, is not a normal third party. But even it he were, it is well established that a typical third party has rights which protect him from burdensome subpoenas. *Application of Magnus,* 299 F. 2d 335, 337 (2d Cir.), *cert. denied,* 370 U.S. 918 (1962)

(third party corporation has standing to object to an IRS subpoena which would infringe constitutional rights); *Amsler* v. *United States*, 381 F. 2d 37, 51 (9th Cir. 1967) (Rule 17 subpoena to third party quashed when court held subpoena was oppressive and unreasonable). As Judge Moore stated in *In Re Magnus, Mabee & Reynard, Inc.*, 311 F. 2d 12 (2d Cir.), *cert. denied*, 373 U.S. 902 (1962):

> Third parties have the protection always accorded to them by the courts which limit burdensome subpoenas, restrict them to relevant materials and refuse to permit unwarranted searches and seizures. (311 F. 2d at 16).

Thus, even judicial subpoenas directed to third parties have been restricted to *relevant* materials, not materials which have a "likelihood of relevancy" as the Special Prosecutor suggests. Even as a normal third party responding to a judical subpoena, the President should be afforded, at a minimum, the full range of rights afforded by the Fourth Amendment. As this Court observed in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946), a subpoena is, in many ways, like a search warrant and as such it must meet the constitutional requirements of the Fourth Amendment. In the instant case, the Special Prosecutor's inadequate showing of relevancy can be likened to the lack of definiteness and overbreadth which are abuses guarded against by the Fourth Amendment. In this context, the Court in *Oklahoma Press* held, "[t]he gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable." 327 U.S. at 208.

The district court's finding that the Special Prosecutor was merely seeking "evidentiary items from a third party" is clearly erroneous. The Constitution states, "The executive Power shall be vested in a President of the United States of America." U.S. Const., Article II, section 1. To allow this constitutionally mandated power to be challenged and overcome by a district court subpoena issued under the standards governing subpoenas to third parties, is an action that would erode and ultimately destroy the "separation of powers" concept that has existed since 1787.

CONCLUSION

Last fall, the United States Court of Appeals for the District of Columbia circuit observed in *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973):

> We acknowledge that wholesale public access to Executive deliberations and documents would cripple the Executive as a co-equal branch. (487 F. 2d at 715).

The velocity with which the confidentiality of presidential communications has eroded in the short time since the quoted words were written is demonstrated by the vast scope of the Special Prosecutor's pending subpoena, by the meager grounds offered to support it, and by the district court's casual disposition of the President's motion to quash. This circumstance—and the escalating confusion and torrent of prejudicial leaks generated by the concurrent involvement of the President in criminal proceedings as a so-called "third party" and in an impeachment investigation as the putative respondent—recalls the introductory words

of the brief filed on behalf of the President in *Nixon* v. *Sirica*. Those words are relevant here because they analyze the dynamics of this case and the course it will take in terms that continue to be valid for this and other Presidents in their effort to maintain the confidentiality upon which the effective functioning of the Presidency so crucially depends.

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Holmes, J., dissenting in *Northern Securities Co.* v. *United States,* 193 U.S. 197, 400–401 (1904). This case is a classic illustration of the danger against which Justice Holmes warned.

The District Court, in a decision utterly without precedent, has held that it is for it, and not for the President, to decide whether the public interest requires that private Presidential conversations be kept confidential, and it has held that it may, by compulsory process, order the President to produce recordings of these conversations if the Court determines to do so.

As recently as a year ago such a ruling would have been unthinkable. The universal view of the legal community, as reflected in the literature, was that the

courts lacks power to substitute their judgment for that of the President on an issue of this kind and that they lack power to compel a President to make production. It was, quite literally, hornbook law that "confidential communications to and from the President are inviolate to a judicial request * * *." Forkosch, *Constitutional Law* 131 (1963).

The change in the climate of legal and popular opinion that has made a ruling such as that of the District Court possible is the result of Watergate. The hydraulic force arising out of that sordid and unhappy episode has led men of great distinction to suppose that the Constitution means something different today than it meant throughout all of our history and to contend that the need to exhaust every avenue of factual inquiry concerning Watergate ranks so high in our national priorities that it must be served, even if the cost is to impair markedly the ability of every President of the United States from this time forward to perform the Constitutional duties vested in him.

It is no exaggeration to say that the revelations of Watergate have so sharpened the public appetite for more revelations that the claim of a Presidential right and responsibility under the Constitution to maintain the confidentiality of Presidential conversations must run the gamut of a broadly held popular sentiment that the claim is probably unjust and is therefore presumably unsound. The President's assertion of a right to maintain this confidentiality, a right relied on by every President since George Washington, is

551-585—74——11

likened to the absolute claim of kings. His stand on an important Constitutional principle is viewed in many places with suspicion or even hostility. Despite his unprecedented cooperation with the investigations by allowing his advisers to testify about relevant portions of the conversations in question, he stands accused in some quarters of obstructing rather than facilitating the investigations.

Our submission on this appeal must acknowledge this Watergate phenomenon since it is an operative factor, though it is one that courts, judging in calmness and not moved by the passions of the moment, should be expected to ignore. We conceive it to be our task to demonstrate that the decision below was reached by casting the Constitution in the mold of Watergate rather than by applying Constitutional practices and restraints to the facts of Watergate. It is our further responsibility to show that what may seem inevitably just in the heat and excitement of an unprecedented political scandal may prove inexorably corrosive to the principles and practices of a Constitution that must stand the test of a long and uncertain future and serve the needs of a changing culture and polity.

With all respect, the decision below did not harmlessly walk the "middle ground" between an overbroad claim of privilege and an excessive demand for discovery. We do not doubt at all but that this was the well-intentioned aim of the distinguished judge of the court below. But in result, the ruling below, in decisive terms, came down squarely on the side of breaching the wall of confidentiality of Presidential communi-

cations. If sustained, that decision will alter the nature of the American Presidency profoundly and irreparably. If sustained, it will alter, equally irreparably, the delicate balance that has existed between three heretofore separate and co-equal branches of government.

* * * * *

For the foregoing reasons, the decision of the district court denying the President's motions to quash and expunge should be reversed.

Respectively submitted.

JAMES D. ST. CLAIR,
MICHAEL A. STERLACCI,
JEROME J. MURPHY
LOREN A. SMITH,
JAMES R. PROCHNOW,
EUGENE R. SULLIVAN,
JEAN A. STAUDT,
THEODORE J. GARRISH,
JAMES J. TANSEY,
LARRY G. GUTTERRIDGE,
Attorneys for the President.

The White House,
Washington, D.C. 20500,
Telephone Number: 456–1414

(APPENDIX)

APPLICABLE 'PROVISIONS OF CONSTITUTION, STATUTES, RULES, AND REGULATIONS

1. The Constitution of the United States provides in pertinent part—

Article I, Section 2:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.
>
> No person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.
>
> [Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other persons.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, * * but each State shall have at Least one Representative; and until such enumeration shall

> be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.
>
> When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.
>
> The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.
>
> * * * * *
>
> The Senate of the United States shall be composed of two Senators from each State, [chosen by the Legislature thereof,] * * * for six Years; and each Senator shall have one Vote.
>
> Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equaly as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one-third may be chosen every second Year; [and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.]*
>
> No Person shall be a Senator who shall not have attained to the Age of thirty years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.
>
> The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

* * * * *

Article I, Section 5:

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any questions shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other,

adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

* * * * *

Article I, Section 6:

Section 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

* * * * *

Article II, Section 1:

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice-President, chosen for the same Term, be elected, as follows.

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[The Electors shall meet in their respective States, and vote by Ballot for two persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.]

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible

to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

[In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law, provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:- -"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

* * * * *

Article II, Section 2:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons

for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

* * * * *

Article II, Section 3:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

* * * * *

Article III, section 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under

their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

* * * * *

2. Title 18, United States Code, provides in pertinent part:

§ 371. Conspiracy to commit offense or to defraud United States—

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

* * * * *

§ 1001. Statements or entries generally—

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

* * * * *

§ 1503. Influence or injuring officer, juror or witness generally—

Whoever corruptly or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter of communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

As amended Oct. 17, 1968, Pub. L. 90–578, Title III, § 301(a) (1), (3), 82 Stat. 1115.

§ 1621. Perjury generally—

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States. June 25, 1948, c. 645, 62 Stat. 733; Oct. 3, 1964, Pub. L. 88–619, § 1, 78 Stat. 995.

* * * * *

§ 1623. False declarations before grand jury or court—

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the

defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Added Pub. L. 91–452, Title IV, § 401(a), Oct. 15, 1970, 84 Stat. 932.

§ 35.00. Demands for production of statements and reports of witnesses—

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

[*See main volume for text of* (b) *and* (c)]

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

As amended Pub. L. 91–452, Title I, § 102, Oct. 15, 1970, 84 Stat. 926.

* * * * *

§ 3731. Appeal by United States—

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title.

The provisions of this section shall be liberally construed to effectuate its purposes.

As amended Jan. 2, 1971, Pub. L. 91–644, Title III, § 14(a), 84 Stat. 1890.

Title 28, United States Code, provides in pertinent part:

§ 44. Appointment, tenure, residence and salary of circuit judges—

(a) The President shall appoint, by and with the advice and consent of the Senate, circuit judges for the several circuits as follows:

Circuits	*Number of Judges*
District of Columbia	Nine
First	Three
Second	Nine
Third	Nine
Fourth	Seven
Fifth	Fifteen
Sixth	Nine
Seventh	Eight
Eighth	Eight
Ninth	Thirteen
Tenth	Seven

(b) Circuit judges shall hold office during good behavior.

(c) Except in the District of Columbia, each circuit judge shall be a resident of the circuit for which appointed at the time of his appointment and thereafter while in active service.

(d) Each circuit judge shall receive a salary of $33,000 a year. As amended Aug. 3, 1949, c. 387, § 1, 63 Stat. 493; Feb. 10, 1954,

c. 6, § 1, 68 Stat. 8; Mar. 2, 1955, c. 9, § 1 (b), 69 Stat. 10; May 19, 1961, Pub. L. 87–36, § 1(b), 75 Stat. 80; Aug. 14, 1964, Pub. L. 88–426, Title IV, § 403(b), 78 Stat. 434; Mar. 18, 1966, Pub. L. 89–372, § 1(b), 80 Stat. 75; June 18, 1968, Pub. L. 90–347, § 3, 82 Stat. 183.

* * * * *

§ 133. Appointment and number of district judges—

The President shall appoint, by and with the advice and consent of the Senate, district judges for the several judicial districts, as follows:

As amended June 2, 1970, Pub. L. 91–272, § 1(c), (d), 84 Stat. 294, 295; Dec. 18, 1971, Pub. L. 92–208, § 3(d) 85 Stat. 742.

§ 1254. Courts of appeals; certiorari; appeal; certified questions—

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire

matter in controversy. June 25, 1948, c. 646, 62 Stat. 928.

* * * * *

§ 1291. Final decisions of district courts—

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85–508, § 12(e), 72 Stat. 348.

* * * * *

§ 1651. Writs—

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. June 25, 1948, c. 646, 62 Stat. 944; May 24, 1949, c. 139, § 90, 63 Stat. 102.

Title 44, United States Code, provides in pertinent part:

§ 2107. Material accepted for deposit—

When the Administrator of General Services considers it to be in the public interest he may accept for deposit—

(1) the papers and other historical materials of a President or former President of the United States, or other official or former official of the Government, and other papers relating to and contemporary with a President or former President of the United States, subject to restrictions agree-

able to the Administrator as to their use; and

(2) documents, including motion-picture films, still pictures, and sound recordings, from private sources that are appropriate for preservation by the Government as evidence of its organization, functions, policies, decisions, procedures, and transactions. Pub. L. 90–620, Oct. 22, 1968, 82 Stat. 1288.

* * * * *

§ 2108. Presidential archival depository—

(c) When the Administrator considers it to be in the public interest, he may exercise, with respect to papers, documents, or other historical materials deposited under this section, or otherwise, in a Presidential archival depository, all the functions and responsibilities otherwise vested in him pertaining to Federal records or other documentary materials in his eutody or under his control. The Administrator, in negotiating for the deposit of Presidential historical materials, shall take steps to secure to the Government, as far as possible, the right to have continuous and permanent possession of the materials. Papers, documents, or other historical materials accepted and deposited under section 3106 of this title and this section are subject to restrictions as to their availability and use stated in writing by the donors or depositors, including the restriction that they shall be kept in a Presidential archival depository. The restrictions shall be respected for the period stated, or until revoked or terminated by the donors or depositors or by persons legally qualified to act on their behalf. Subject to the restrictions, the Administrator may dispose by sale, exchange, or otherwise, of papers, documents, or other materials which the Archivist determines to

have no permanent value or historical interest or to be surplus to the needs of a Presidential archival depository. Pub. L. 90–620, Oct. 22, 1968, 82 Stat. 1289.

3. Rule 26, Federal Rules of Civil Procedure, provides in pertinent part:

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

* * * * *

(3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case

and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

* * * * *

Rule 6, Federal Rules of Criminal Procedure, provides in pertinent part:

(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

* * * * *

Rule 17, Federal Rules of Criminal Procedure, provides in pertinent part:

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the

subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

* * * * *

4. Department of Justice Order No. 551–73 (Nov. 2, 1973) 38 Fed. Reg. 30,738 adding 28 C.F.R. §§ 0.37, and 0.38, and Appendix to Subpart G–1, provides:

TITLE 28—JUDICIAL ADMINISTRATION

CHAPTER I—DEPARTMENT OF JUSTICE

Part O—Organization of the Department of Justice

Order No. 551–73

Establishing the Office of Watergate Special Prosecution Force

By virtue of the authority vested in me by 28 U.S.C. 509, 510 and 5 U.S.C. 301, there is hereby established in the Department of Justice, the Office of Watergate Special Prosecution Force, to be headed by a Director. Accordingly, Part O of Chapter I of Title 28, Code of Federal Regulations, is amended as follows:

1. Section 0.1(a) which lists the organization units of the Department, is amended by adding "Office of Watergate Special Prosecution Force" immediately after "Office of Criminal Justice."

2. A new Subpart G–1 is added immediately after Subpart G, to read as follows:

"Subpart G–1—Office of Watergate Special Prosecution Force

§ 0.37 General Functions

The Office of Watergate Special Prosecution Force shall be under the direction of a Director who shall be the Special Prosecution Force shall be under the direction of The duties and responsibilities of the Special Prosecutor are set forth in the attached appendix which is incorporated and made a part hereof.

§ 0.38 Specific Functions.

The Special Prosecutor is assigned and delegated the following specific functions with respect to matters specified in this Subpart:

(a) Pursuant to 28 U.S.C. 515(a), to conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings, which United States attorneys are authorized by law to conduct, and to designate attorneys to conduct such legal proceedings.

(b) To approve or disapprove the production or disclosure of information or files relating to matters within his cognizance in response to a subpoena, order, or other demand of a court or other authority. (See Part 16(B) of this chapter.)

(c) To apply for and to exercise the authority vested in the Attorney General under 18 U.S.C. 6005 relating to immunity of witnesses in Congressional proceedings.

The listing of these specific functions is for the purpose of illustrating the authority entrusted to the Special Prosecutor and is not intended to limit in any manner his authority to carry out his functions and responsibilities."

Robert H. Bork,
Acting Attorney General.

Date: November 2, 1973.

APPENDIX

Duties and Responsibilities of the Special Prosecutor

The Special Prosecutor

There is appointed by the Attorney General, within the Department of Justice, a Special Prosecutor to whom the Attorney General shall delegate the authorities and provide the staff and other resources described below.

The Special Prosecutor shall have full authority for investigating and prosecuting offenses against the United States arising out of the unauthorized entry into Democratic National Committee Headquarters at the Watergate, all offenses arising out of the 1972 Presidential Election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the President, members of the White House staff, or Presidential appointees, and any other matters which he consents to have assigned to him by the Attorney General.

In particular, the Special Prosecutor shall have full authority with respect to the above matters for:

—conducting proceedings before grand juries and any other investigations he deems necessary;

—reviewing all documentary evidence available from any source, as to which he shall have full access;

—determining whether or not to contest the assertion of "Executive Privilege" or any other testimonial privilege;

—determining whether or not application should be made to any Federal court for a grant of immunity to any witness, consistently with applicable statutory requirements, or for warrants, subpoenas, or other court orders;

—deciding whether or not to prosecute any individual, firm, corporation or group of individuals;

—initiating and conducting prosecutions, framing indictments, filing informations, and handling all aspects of any cases within his jurisdiction (whether initiated before or after his assumption of duties), including any appeals;

—coordinating and directing the activities of all Department of Justice personnel, including United States Attorneys;

—dealing with and appearing before Congressional committees having jurisdiction over any aspect of the above matters and determining what documents, information, and assistance shall be provided to such committees.

In exercising this authority, the Special Prosecutor will have the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice. The Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions. The Special Prosecutor will determine whether and to what extent he will inform or consult with the Attorney General about the conduct of his duties and responsibilities. In accordance with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, the Special Prosecutor will not be removed from his

duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action.

Staff and Resource Support

1. *Selection of Staff.*—The Special Prosecutor shall have full authority to organize, select, and hire his own staff of attorneys, investigators, and supporting personnel, on a full or part-time basis, in such numbers and with such qualifications as he may reasonably require. He may request the Assistant Attorneys General and other officers of the Department of Justice to assign such personnel and to provide such other assistance as he may reasonably require. All personnel in the Department of Justice, including United States Attorneys, shall cooperate to the fullest extent possible with the Special Prosecutor.

2. *Budgets.*—The Special Prosecutor will be provided with such funds and facilities to carry out his responsibilities as he may reasonably require. He shall have the right to submit budget requests for funds, positions, and other assistance, and such requests shall receive the highest priority.

3. *Designation and Responsibility.*—The personnel acting as the staff and assistants of the Special Prosecutor shall be known as the Watergate Special Prosecution Force and shall be responsible only to the Special Prosecutor.

Continued Responsibilities of Assistant Attorney General, Criminal Division.—Except for the specific investigative and prosecutorial duties assigned to the Special Prosecutor, the Assistant Attorney General in charge of the Criminal Division will continue to exercise all of the duties currently assigned to him.

Applicable Departmental Policies.—Except as otherwise herein specified or as mutually agreed between the Special Prosecutor and the Attorney General, the Watergate Special Prosecution Force will be the subject to the administrative regulations and policies of the Department of Justice.

Public Reports.—The Special Prosecutor may from time to time make public such statements or reports as he deems appropriate and shall upon completion of his assignment submit a final report to the appropriate persons or entities of the Congress.

Duration of Assignment.—The Special Prosecutor will carry out these responsibilities with the full support of the Department of Justice, until such time as, in his judgment, he has completed them or until a date mutually agreed upon between the Attorney General and himself.

5. Department of Justice Order No. 554–73 (Nov. 19, 1973), 38 Fed. Reg. 32,805, amending 28 C.F.R. Appendix to Subpart G–1, provides—

TITLE 28—JUDICIAL ADMINISTRATION

CHAPTER I—DEPARTMENT OF JUSTICE

Part O—Organization of the Department of Justice

Subpart G–1—Office of Watergate Special Prosecution Force

Order No. 554–73

AMENDING THE REGULATIONS ESTABLISHING THE OFFICE OF WATERGATE SPECIAL PROSECUTION FORCE

By virtue of the authority vested in me by 28 U.S.C. 509, 510 and 5 U.S.C. 301, the last sentence of the fourth paragraph of the Appendix to Subpart G–1 is amended to read as follows: "In accordance with assurances given

by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, (1) the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action, and (2) the jurisdiction of the Special Prosecutor will not be limited without the President's first consulting with such Members of Congress and ascertaining that their consensus is in accord with his proposed action."

ROBERT H. BORK,
Acting Attorney General.

Date: November 19, 1973.

6. The letter from the Acting Attorney General to the Special Prosecutor on November 21, 1973, stating the intention of Department of Justice Order No. 554–73, is as follows—

OFFICE OF THE SOLICITOR GENERAL,
Washington, D.C. 20530,
November 21, 1973.

LEON JAWORSKI, Esq.,
Special Prosecutor,
Watergate Special Prosecution Force,
1425 K Street, N.W.,
Washington, D.C. 20005

DEAR MR. JAWORSKI: You have informed me that the amendment to your charter of November 19, 1973 has been questioned by some members of the press. This letter is to confirm what I told you in our telephone conversation. The amendment of November 19, 1973 was intended to be, and is, a safeguard of your independence.

The President has given his assurance that he would not exercise his constitutional powers either to discharge the Special Prosecutor or to limit the independence of the Special Prosecutor without first consulting the Majority and Minority leaders and chairmen and ranking members of the Judiciary Committees of the Senate and the House, and ascertaining that their consensus is in accord with his proposed action.

When that assurance was worked into the charter, the draftsman inadvertently used a form of words that might have been construed as applying the President's assurance only to the subject of discharge. This was subsequently pointed out to me by an assistant and I had the amendment of November 19 drafted in order to put beyond question that the assurance given applied to your independence under the charter and not merely to the subject of discharge.

There is, in my judgment, no possibility whatever that the topics of discharge or limitation of independence will ever be of more than hypothetical interest. I write this letter only to repeat what you already know: the recent amendment to your charter was to correct an ambiguous phrasing and thus to make clear that the assurances concerning congressional consultation and consensus apply to all aspects of your independence.

Sincerely,

ROBERT H. BORK,
Acting Attorney General.

U.S. GOVERNMENT PRINTING OFFICE: 1974

Office-Supreme Court, U. S.
FILED
JUN 22 1974
, CLERK

No. S. 73-1766 and 73-1834

IN THE

Supreme Court of the United States of America

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, *Petitioner*,

v.

RICHARD M. NIXON,
President of the United States of America, et. al,
Respondents

BRIEF OF RESPONDENT JOHN D. EHRLICHMAN

WILLIAM SNOW FRATES
ANDREW C. HALL
SPENCER H. BOYER
HENRY H. JONES
GERALD ISRAEL

Counsel for Respondent
JOHN D. EHRLICHMAN

INDEX

Opinions Below 1

Jurisdiction 1

Questions Presented 1

Statement of Facts and of the Case 1

Summary of Argument 4

Argument 5

I. The Subpoena Authority under Rule 17 may be used to implement the Prosecutor's duty to disclose 5

II. The materials subpoenaed are subject to disclosure under Federal Rule 16(a), 16(b), The Jencks Act and *Brady v. Maryland* 6

A. Basic Approach to Discovery 6

B. Leaving aside the question as to whether the Government's duty to disclose extends to material in the possession of the President, the materials subpoenaed are all subject to discovery under the Federal Rules and the Jencks Act 8

C. The Significance of the President's Possession 11

III. The Exercise of Executive Privilege cannot prevail over the Defendant's Right to Discovery

Conclusion 16

Certificate of Service 17

TABLE OF CASES AND AUTHORITIES

Alderman v. U.S., 394 U.S. 165 (1968) 14

Bowman Dairy Co. v. U.S. 341 U.S. 214 (1959) 5

Brady v. Maryland, 373 U.S. 83 (1963) 1, 2, 3, 4, 5, 6, 10, 17

Dennis v. U.S. 384 U.S. 855 8

Giles v. Maryland 386 U.S. 66 (1965) 6, 7, 13

Nixon v. Sirica, 487 U.S. 700 (D.C. Cir. 1973) 3

Roviero v. U.S. 353 U.S. 53 (1956) 15

Ross v. Texas 474 F 2d 1150 (5th Cir. 1973) 12

U.S. v. Abrams, 29 F.R.D. 178 (1960) 11

U.S. v. Andolschek, 142 F 2d 503 (2d Cir. 1948) 15

U.S. v. Bryant, 431 F 2d 624 (D.C. Cir. 1974) 6, 11

U.S. v. Crisona, 416 F 2d 107 (2d Cir. 1969) 8, 9

U.S. v. Deutsch, 475 F 2d 55 (5th Cir. 1973) 12

U.S. v. Krogh, 391 F 2d 138 (2d Cir. 1968) 11

U.S. v. Leightfuss, 331 F. Supp 723 (N.D. Ill. 1971) 5, 13

U.S. v. Lumbomski, 277 F Supp. 713 (N.D. Ill. 1967) 8

U.S. v. Percevault, 61 F R.D. 338 (E.D.N.Y. 1973) Rv'd .... F 2d .... (2d Cir. 1974) 9

U.S. v. Reid, 43 F.R.D. 820 (N.D. Ill. 1967) 14

U.S. v. Reynolds, 345 U.S. 1 (1953) 15

U.S. v. Rosenberg, 299 F. Supp. 1241 (E.D.N.Y. 1969) 9

U.S. v. Rosenberg, 10 F.R.D. 521 (S.D.N.Y. 1950) 14

U.S. v. Taylor, 25 F.R.D. 225 (E.D.N.Y. 1960) 6

STATUTES

18 USC Sec. 1623 1

18 USC Sec. 3500 ..... 1, 3, 10

RULES OF PROCEDURE

Rule 16, Federal Rules of Criminal Procedure 4, 5, 6, 8, 9, 10, 11, 14

Rule 17(c), Federal Rules of Criminal Procedure 3, 4, 5, 6, 9

Rule 54(c) Federal Rules of Criminal Procedure 11

Rule 57(b), Federal Rules of Criminal Procedure 6

Idaho R. Crim. Proc. 16(a)(1)(iv) 11

N.J. Rules of Ct. 3:13-3(c) 11

Texas Code Crim. Proc. Art. 39.14 11

OTHER AUTHORITIES

ABA, Standards, Discovery and Procedure Before Trial, Approved Draft 1970, Sec. 24 6

Williams, One Man's Freedom 7

OPINIONS BELOW

The opinion of the District Court is unreported, and is included in the brief of the petitioner.

JURISDICTION

Respondent John D. Ehrlichman adopts by reference the statement in support of jurisdiction filed by the Special Prosecutor in his brief filed with this Court on June 21, 1974.

QUESTIONS PRESENTED

1. Whether the subpoena *duces tecum* in question was properly issued under the Federal Rules of Criminal Procedure.

2. Whether Executive Privilege, (if applicable) or the President's authority as Chief Executive Officer to determine what evidence will be furnished to a subordinate prosecuting official (if such authority is applicable) may prevail over the rights of defendant in a criminal case to discovery under Rule 16, Federal Rules of Criminal Procedure, the Jencks Act (18 U.S.C. 3500), and the government's duty to produce exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963)*

STATEMENT OF FACTS AND THE CASE

The Grand Jury indicted Defendant Ehrlichman and six others for conspiring to obstruct justice, obstructing justice, making false statements to agents of the Federal Bureau of Investigation, and giving false testimony in violation of 18 U.S.C. Sec. 1623. In the course of pretrial discovery, prior to argument on motions to produce filed by the defendants below, the Special Prosecutor filed a motion for an order

* This case presents various issues relating to the applicability of executive privilege, and the relationship of the President and the Special Prosecutor. See, e.g., the Petition for Writ of Certiorari of the Special Prosecutor. Respondent Ehrlichman is not directly concerned with the determination of these issues, except insofar as that determination bears upon his rights of discovery.

directing the issuance of a subpoena *duces tecum* to Richard M. Nixon for the production of a number of tapes and documents relating to a wide variety of Presidential conversations which constitute the *res gestae* of the charges of conspiring to obstruct and obstructing justice. In supporting his request for the subpoena the prosecutor properly asserted that to some measure these conversations and tapes thereof were required to be produced under the government's duty to produce exculpatory evidence as required by *Brady v. Maryland*, 373 U.S. 83 (1963). The Court correctly found that the conversations which were the subject of the subpoena were relevant, material and based thereon entered its order directing the issuance of the subpoena.

The President, through his special counsel, filed a motion to quash the subpoena pursuant to Rule 17(c), Federal Rules of Criminal Procedure. The President asserted that the Court lacked jurisdiction to resolve an inter-executive branch dispute in that the President was the final arbiter as to what evidence would be used in the criminal prosecution; that the doctrine of executive privilege applied to conversations between the President and his senior advisors as a part of the executive decision-making process, and as a result, the documents were not subject to production; and the Special Prosecutor had failed to satisfy the relevancy and materiality requirements of Rule 17(c) Federal Rules of Criminal Procedure; and that *Brady v. Maryland, supra,* did not include documents or records which were within the possession, custody and control of the Office of the President. The President further asserted that notwithstanding the broad application of *Brady v. Maryland, supra,* that rule does not include privileged documents and that the defendant's right to due process of law was inferior and subject to the concept of executive privilege.

Respondent Ehrlichman filed a memorandum in opposition to the President's motion to quash asserting that the government had a duty to produce transcripts and records relating to the subpoenaed conversations under Rule 16(a),

Rule 16(b), *Brady v. Maryland, supra,* and by inference the Jencks Act. Respondent Ehrlichman further asserted that the Special Prosecutor's subpoena was an appropriate mechanism for obtaining material so as to fufill the duty owed to the defendants under *Brady v. Maryland,* Rule 16, and the Jencks Act. Respondent Ehrlichman further asserted that the duty to produce documents was absolute and that in the absence of production, the prosecution could not go forward.

In its opinion of May 20, 1974, the District Court rejected the contention that the proceeding involved solely an intra-executive dispute thereby depriving the Court of jurisdiction; rejected the claim of executive privilege on the authority of *Nixon v. Sirica,* 487 F 2d 700 (D.C. Cir. 1973); held that the Special Prosecutor had satisfied the requirements of Rule 17(c) because the subpoena was based upon the Special Prosecutor's need for these materials for his own use at trial. The Court found it unnecessary, therefore, to rule upon the "defendant's contention that the subpoenaed materials are necessarily producible to them under the principles enunciated in *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, the Jencks Act, 18 U.S.C. Sec. 3500, and Rules of Discovery for Criminal Proceedings." The opinion did note, however:

> It is, of course, the Special Prosecutor's continuing obligation to furnish defendants with *Brady* material that comes into his possession. Defendants' requests for access to the whole of materials produced will be more appropriately considered in conjunction with their pretrial discovery motions.

The substance of the subpoenaed conversations are carefully discussed in the Appendix to the Special Prosecutor's Memorandum filed in Opposition to the Motion to Quash in the Trial Court. Since Defendant Ehrlichman does not have the benefit of the Grand Jury transcripts and other evidence in the possession of the Government, the assertions of the Prosecutor must, for the time being, be accepted as accurate. The substance of the subpoenaed con-

versations are fully discussed in that appendix and no further amplification can be provided until after discovery is had.

SUMMARY OF ARGUMENT

The Respondent agrees that the Special Prosecutor met the standards for issuance of the subpoena under Rule 17(c), even if the Court considers only the Special Prosecutor's own use of the materials subpoenaed. However, the subpoena also can be supported by the Special Prosecutor's duty to disclose the material subpoenaed, *i.e.*, that Rule 17(c) has been employed by the Special Prosecutor to obtain materials that will eventually be required to submit to the inspection of the defendants pursuant to the Federal Rules, the Jencks Act, and *Brady v. Maryland*. The materials covered by the subpoena all fall within one or more of the categories of materials subject to discovery under the Federal Rules or the Jencks Act. Some are recorded statements of the defendant, which are discoverable under Rule 16(a). Others are recorded statements of co-defendants, discoverable under 16(b). Still others are recorded statements of prospective prosecution witnesses and therefore must eventually be made available under the Jencks Act. Finally, much of the material may be exculpatory, and therefore subject to disclosure under *Brady*. The fact that the materials are in the possession of the President does not relieve the Prosecutor of his duty to disclose the same. Rule 16 and the Jencks Act apply to statements possessed by any agent of the Executive Branch and *Brady* has the same scope, at least where a specific claim for particular material has been made.

The Respondent is not directly involved in the dispute as to the claim of executive privilege or executive authority to control the evidence submitted in a Federal prosecution. Accordingly, this brief does not consider these issues except with respect to one point—such privilege or special authority, if applicable, cannot override the defendant's

right to discovery. If discovery is not granted as required under the Federal Rules, *Brady*, and the Jencks Act, the prosecution must be dismissed.

ARGUMENT

I. *The Subpoena Authority under Rule 17 may be used to implement the prosecution's duty to disclose.*

The court below found that requirements of Rule 17(c), Federal Rules of Criminal Procedure, had been met by the prosecutor with respect to the prosecutor's own potential use of the subpoenaed material at trial. Respondent agrees with this conclusion, which, as the court below noted, is fully supported by an analysis of the conversations in question. Respondent also contends, however, that the material subpoenaed must be disclosed to the defendant under Rule 16, Federal Rules of Criminal Procedure, *Brady v. Maryland*, and the Jencks Act, and the Special Prosecutor can properly utilize Rule 17 as a vehicle to obtain that material so as to comply with his duty to disclose.

Admittedly, such use of Rule 17 is unusual. Ordinarily, if the U.S. Attorney does not have material subject to his duty to disclose in his immediate possession, that material may be obtained promptly by informal communication. See *e.g., United States v. Leichtfuss*, 331 F. Supp. 723 (N.D. Ill. 1971) (involving disclosure of various records of Selective Service Boards). Here, however, where customary informal requests within the government have been to no avail, Rule 17(c) must be available. The use of the subpoena *duces tecum* is entirely consistent with the wording of Rule 17(c) and Supreme Court's interpretation of 17(c) in *Bowman Dairy Co. v. United States*, 341 U.S. 214 (1951). *Bowman Dairy, supra*, arose in the context of an attempt by a defendant to obtain from the Government, before trial, material to which it was not entitled under the discovery provisions of Rule 16. The same would be true in a case where, for example, the government loaned evidence in its possession to a third party (*e.g.*, an agency of another jurisdic-

tion). Since the government, having had the material, would still be responsible for its production, see *United States v. Bryant*, 431 F 624, 642 (D.C. Cir. 1971), Rule 17(c) would be the appropriate means of obtaining that evidence. The Special Prosecutor clearly established in the District Court the evidentiary value of the materials in question here.

The Court, in *Bowman* emphasized that "Rule 17(c) was not intended to provide an additional means of discovery." 341 U.S. at 220. However, the Court also noted:

> It would be strange indeed if the defendant discovered some evidence by the use of Rule 16 . . . and yet could not require its production by Rule 17(c).

Although this case is obviously quite different, the Court's recognition in *Bowman* that Rule 17(c) must be available to implement Rule 16 is equally applicable here. Indeed, if Rule 17(c) were not available, the court could certainly issue a subpoena *duces tecum* under Rule 57(b) to implement Rule 16. *cf., United States v. Taylor*, 25 F.R.D. 225, 228 (E.D.N.Y. 1960). The *ABA Standards, Discovery and Procedure Before Trial, Approved Draft* 1970 Sec. 24 (material held by other governmental personnel) report that such an approach is proper. These standards provide:

> . . . and if the prosecuting attorney's efforts are unsuccessful and such material . . . are subject to the jurisdiction of the Court, the Court shall issue suitable subpoenas . . . to cover such material to be made available to defense counsel.

II. *The materials subpoenaed are subject to disclosure under Federal Rule 16(a), 16(b), the Jencks Act, and Brady v. Maryland.*

A. BASIC APPROACH TO DISCOVERY

In *Giles v. Maryland*, 386 U.S. 66 (1965), Justice White, in a concurring opinion, said that Courts in enforcing the mandate of *Brady v. Maryland*, 373 U.S. 83 (1963) requiring production by the Government of material in its possession that is exculpatory should compare "what the state knows at trial in comparison to knowledge held by the defense." *Giles v. Maryland*, 386 U.S. 66 at 96 (concurring opinion). The case at bar is an extreme instance of a striking disparity between the resources at the disposal of the Government. The Government has been able to generate long and detailed testimony to invoke unprecedented court remedies and procedures to obtain tapes and documents, to launch an investigation of that testimony and to prosecute using a sizeable staff and budget.

> The Government, it has been said, also has the most superb engine for discovery ever invented by the legal mind—namely, the grand jury. Before trial the prosecutor could call every witness with any knowledge of the facts in front of a grand jury and interrogate him with virtually no holds barred. Neither the accused nor his lawyer had any right to be present, to propose questions to object to procedure. The defendant could not even find out the names of the witnesses who testified against him, much less the substance of their testimony.
>
> *Williams, One Man's Freedom*, p. 168.

In the instant case the grand jury has been engaged in fact gathering and the taking of testimony for an unusually extended period of time. It was empanelled prior to the Watergate break-in on June 5, 1972, over two years ago. So long have its deliberations continued that, for hardship reasons, some grand jurors have had to be excused from further service. Additional grand juries have been empanelled creating collectively one of the major grand jury investigations in history.

In addition, the F.B.I. investigation, the Senate executive session hearings, Senate staff interviews, and investigative interviews conducted by the Senate Select Committee on Presidential Campaign Activities during the last year together with the computerization of cross-references to every witness and every document, have placed in the hands of the Government such a massive amount of detail and investigative material that the comparison suggested by Jus-

tice White in *Giles* between the prosecution's knowledge *vis a vis* that of the defense reveals a dramatic, if not inequitable, disproportion. This lack of equality makes it especially important that issues relating to the scope and importance of the defendant's discovery be viewed in light of the policy, noted in *Dennis v. United States,* 384 U.S. 855, 868, that "disclosure rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice."

While the subpoenaed materials in this case are obviously important to the Special Prosecutor, they are even more important to the defendant. The significance of these materials is indicated by the very fact that, without relying upon the possible exculpatory quality under *Brady,* substantial portions fall within the category of materials that, because of their essential nature, are made discoverable as a matter of right under the Federal Rules and the Jencks Act.

B. *Leaving aside the question as to whether the government's duty to disclose extends to material in the possession of the President, the materials subpoenaed are all subject to discovery under the Federal Rules and the Jencks Act.*

A substantial portion of the taped conversations involve Respondent Ehrlichman. Rule 16 requires the Court to "permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government." Although 16(a) states that the court "may" permit such inspection, lower courts generally have read "may" to mean "shall," in accord with the history of the adoption of the Rule. See Advisory Committee Notes to the Amendment of Rule 16(a), recently approved by the Supreme Court. A tape recording of a conversation clearly constitutes a recorded statement. See, *e.g., United States v. Crisona,* 416 F. 2d 107 (2d Cir. 1969); *United States v. Lubomski,* 277 F.

Supp. 713, 719-722 (N.D. Ill. 1967). Moreover, Rule 16 has regularly been held to apply to recordings of conversations between defendants and third persons who are not investigative agents of the government. See, *e.g., United States v. Crisona, supra; United States v. Rosenberg,* 299 F. Supp. 1241 (S.D.N.Y. 1969).

As noted in *Crisona, supra,* there is "nothing in the plain language of Rule 16(a) or the Notes of the Advisory Committee accompanying it "which would suggest limiting Rule 16 to statements made to investigative agents or to statements made prior to arrest. 416 F 2d at 115. Finally, as shown by the Special Prosecutor in his memorandum supporting the subpoena, the recorded statements are all clearly "relevant" both for the purposes of Rule 17(c) and 16(a).

Some of the recorded conversations covered in the Special Prosecutor's subpoena did not involve the Respondent. However, these conversations all involved conversations of the President with co-defendants or prospective government witnesses. Since indicted co-defendants are not prospective witnesses, the statements do not fall within the Jencks Act limitation upon pretrial discovery. Rather, they are discoverable under the first sentence of Rule 16(b), which permits discovery of "document,s tangible objects . . . or copies or portions thereof, which are within the possession, custody, or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable."

Statements of co-defendants in conspiracy cases arguably should be discoverable automatically under Rule 16(a). In *United States v. Percevault,* 61 F.R.D. 338 (E.D.N.Y. 1973) the Court concluded that, under Rule 16, a defendant can compel production of co-conspirators' statements. The court reasoned that under Rule 16(a) the defendant had an absolute right to all written or recorded statements or confessions made by him. The court further reasoned that

under the rules of evidence, a statement by a co-conspirator is admissible against the defendant. Consequently, the court concluded that if a co-conspirator's statement is to be introduced into evidence against the defendant on the theory that it is the defendant's own statement, fairness dictates that under Rule 16(a) the defendant be allowed to discover this pre-arrest statement along with statements the defendant uttered. Thus, the court held that under Rule 16(a) the government must furnish the defendant with statements of co-conspirators—whether or not named in the indictment—which the government intends to offer into evidence against the defendant. The court further concluded that since sub-division (a), unlike sub-division (b) of Rule 16, is not subject to a Jencks Act exception, this result applies whether or not the co-conspirator will testify as a government witness. Judge Weinstein's opinion in *Percevault* was later reversed by the United States Court of Appeals, ... F 2d .... (2d Cir. 1974). Nevertheless, his reasoning remains persuasive—although not crucial in terms of supporting the prosecutor's case of Rule 17(b) to implement his duty to disclose under Rules 16(a) and (b).

The statement of non-defendants who are prospective government witnesses must be made available to the defendant under the Jencks Act. That Act as amended in 1970, now extends to all statements within the possession of the United States, whether or not made to a government agent. See, 18 U.S.C. Sec. 3500.

Finally, aside from his duty to obtain materials which would be a duty to produce under Rule 16 and the Jencks Act, the prosecutor could also justify his subpoena request (as he did) upon his duty to disclose exculpatory material under *Brady v. Maryland*. While the precise contents of the subpoenaed material are unknown, there is reason to believe that it may contain exculpatory material. It should be noted in this regard that the standard for determination, what might constitute exculpatory material is traditionally

applied more liberally where, as here, a specific request for the material has been made. See *United States v. Krogh*, 391 F. 2d 138 (2d Cir. 1968)

C. THE SIGNIFICANCE OF THE PRESIDENT'S POSSESSION

The President's counsel suggested in the court below that prosecution's duty to make disclosure to the defendant extends only to materials "in the hands of the prosecutor or the investigative agency involved in the case." This position is contrary to both the language and thrust of the Rules, statutes and decisions upon which defendant's right to discovery is based. Rule 16 refers to materials "within the possession, custody or control of the *government*". It is not limited to materials within the possession of the "attorney for the government." See Rule 54(c). Compare the language of various State discovery rules, *e.g.*, Idaho R. Crim. P. 16(a)(1)(iv) (prosecuting attorney); N.J. Rules of Court 3:13-3(c) (prosecuting attorney); Tex. Code Crim. P. Art. 39-14 ("of the State or any of its agencies"). Decisions relying upon that Rule have required production of materials within the possession of agencies that are not part of the Department of Justice. See, *United States v. Abrams*, 29 F.R.D. 178 (1960) (Statements given to Securities & Exchange Commission). The language of the Jencks Act is equally broad. It refers to statements "in the possession of the United States." Indeed, *United States v. Bryant*, 439 F. 2d 642 (D.C. Cir. 1972), cited by the President's counsel in connection with the alleged limited scope of Brady, clearly recognizes scope of Federal Rule 16 and the Jencks Act.

> The fact that it was the Bureau of Narcotics and Dangerous Drugs, and not the United States Attorney's office, which had possession of the tape in these cases does not render it any less discoverable. The duty of disclosure affects not only the prosecutor, but the Government as a whole, including its investigative agencies. Rule 16 and the Jencks Act refer, respectively, to

evidence gathered by "the government" and by "the United States," not simply that held by the prosecution. *Brady* did speak of "suppression by the prosecution," but in this context "prosecution" is certainly broad enough to include investigation. In any event, we are confident that the Supreme Court would extend its holding to suppression by investigative agencies. Such suppression must be regulated if the disclosure requirement is to be a strong safeguard; if only the prosecutor were under the command of *Brady*, the right to a fair trial would depend on the uncertain and uncontrolled decisions of Government investigators.

As the Court in *Bryant* noted, the thrust of *Brady* cannot effectively be limited to material within the possession of the prosecutor alone. The *Bryant* decision reflects that *Brady* should be applied *at least* to investigative agency should be the farthest reach of *Brady*. Respondent acknowledges that the investigative agency may be a proper outer limit as to a violation of due process by suppression of evidence *when no* demand for specific material in the possession of a specific governmental office has been made. In *Ross v. Texas*, 474 F. 2d 1150, 1153, (5th Cir. 1973), relied upon in the motion to quash, no such specific request had been made. The court there refused to overturn a conviction because allegedly exculpatory reports had not been made available. The 5th Circuit stated that it was "of the utmost significance that neither the prosecutor nor any of his assistants were in possession of the police report *or were even aware of its existence.*" The court properly noted that it could place upon "the prosecutor's shoulders the added burden of discovering all such evidence even though buried somewhere in the files." The 5th Circuit took a considerably different view of *Brady* however, where a specific request had been made before trial. In *United States v. Deutsch*, 475 F. 2d 55 (5th Cir. 1973), the Court noted:

> Before trial defendants moved for the production of Morrison's personnel file, for "insight into the character of said prospective witness," citing *Brady v. Maryland*, 1963, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed 2d 215. The U.S. Attorney responded, "This office does not have the personnel file of D. F. Morrison." The Court rule, "[T] he prosecution cannot be compelled to disclose something which it does not have. Furthermore, the Post Office Department does not appear to be an arm of the prosecution as contemplated by *Brady*.
>
> We find no reference in *Brady* to an arm of the prosecution. It was a Post Office employee who had been sought to be bribed. The government cannot compartmentalize the Department of Justice and permit it to bring a charge affecting a government employee in the Post Office and use him as its principal witness, but deny having access to the Post Office files. In fact it did not even deny access, but only present possession without even an attempt to remedy the deficiency. *Cf. Barber v. Page*, 1968, 390 U.S. 719, 723-724, 88 S. Ct. 1318, 20 L. Ed 255. W do not suggest by citing *Barber* that the government was obliged to obtain evidence from third parties, but there is no suggestion in *Brady* that different "arms" of the government, particularly when so closely connected as this one for the purpose of the case are severable entities. And, of course, the *Brady* rule requires the government to supply evidence useful to the defendant simply for impeachment purposes. *Giglio v. United States*, 1972, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104.

Cf. United States v. Leichtfuss, 331 F. Supp. 723 (N.D. Ill. 1971) (requiring disclosure of various Selective Service Board); *Giles v. Maryland, supra*, where evidence allegedly suppressed included action taken by officials in a neighboring county, but known to investigative officers of the prosecuting county.

Finally, even if one accepts *arguendo* that the *Brady* duty does not extend to all specified exculpatory evidence within the possession of the government as a whole, Respondent suggests that the court cannot separate the President from the Prosecutor in this type of situation. The President is, after all, the Chief Law Enforcement Officer of the United States. Under ordinary circumstances, he bears ultimate responsibility for the decision to prosecute and the manner in which the prosecution will be presented. Surely the President cannot insulate material from ordinary defense dis-

covery by taking possession of the evidence and establishing a barrier between his office and the attorney for the government regardless of by what authority that attorney represents the United States. In sum, leaving aside the question of privilege, the material sought by the Special Prosecutor, will be subject to discovery under Rule 16, the *Jencks Act*, and *Brady*, and the prosecutor could appropriately utilize a Rule 17(c) subpoena for the purpose of fulfilling his eventual duty to disclose.

III. *The Exercise of Executive Privilege Cannot Prevail Over the Defendant's Right to Discovery*

As noted at the outset, Respondent views the issue of Presidential authority to determine the evidence made available in this case as a subject of dispute between the Special Prosecutor and the President *except insofar as it is suggested that such authority may override the defendant's right to discovery*. While Rule 16 provides for the issuance of protective orders as to discovery, that provision is designed primarily to deal with such matters as attempted intimidation of witnesses. See, *U.S. v. Reid*, 43 F.R.D. 520 N.D. Ill. 1967). Though national security has been recognized as a ground for deferring disclosure, see *United States v. Rosenberg*, 10 F.R.D. 521 (S.D.N.Y. 1950), the government has not been permitted to deny disclosure of relevant material on that ground. Both the Supreme Court and lower courts have repeatedly emphasized that government must either make disclosure or dismiss the charges. Thus, in *Alderman v. United States*, 394 U.S. 165, 181 (1968), the court noted:

> The Government concedes that it must disclose to petitioners any surveillance records which are relevant to the decision of this ultimate issue. And it recognizes that this disclosure must be made even though attended by potential danger to the reputation or safety of third parties or to the national security—unless the United States would prefer dismissal of the case to disclosure of the information. However, the Government contends that it need not be put to this disclose-or-dismiss option in the instant cases because none of the information obtained from its surveillance is "arguably relevant" to petitioners' convictions. See also *United States v. Seale*, 461 F 2d 345, 366 (7th Cir. 1972). *United States v. Coplan*, 185 F. 2d 629, (2nd Cir. 1950).

Similarly in *United States v. Reynolds*, 345 U.S. 1, 12 (1953), the Court recognized the crucial distinction between civil and criminal cases even with respect to the non-disclosure of matters relating to important "state secrets":

> "Respondents have cited us to those cases in the criminal field, where it has been held that the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. Such rationale has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented."

The same approach has been followed with respect to privileges relating to effective law enforcement. Thus, in *Roviaro v. United States*, 353 U.S. 53, 60-61 (1956), the Court noted:

> Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action.

Similarly in *United States v. Andolschek*, 142 F. 2d 503, 506 (2d Cir. 1944), the Court, per L. Hand J., noted with respect to a government claim that disclosure of their reports was barred by regulation:

> It is true that in *Boske v. Comingore*, 177 U.S. 459, 20 S. Ct. 701, 44 L. Ed. 846, the validity of a similar regulation was upheld. However, none of these cases involved the prosecution of a crime consisting of the

> very matters recorded in the suppressed document, or of matters nearly enough akin to make relevant the matters recorded. That appears to us to be a critical distinction. While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully. Nor does it seem to us possible to draw any line between documents whose contents bears directly upon the criminal transactions, and those which may be only indirectly relevant. Not only would such a distinction be extremely difficult to apply in practice, but the same reasons which forbid suppression in one case forbid it in the other, though not, perhaps, quite so imperatively. We hold that the regulation should have been read not to exclude the reports here in question.

Surely, the President's authority to disclose the matters subpoenaed, if he has such authority, rests on no higher plane with respect to the defendant than claims of "national security," "state secret" or even protecting the life of a secret informant. It should be noted that the "privilege" claimed by President is not a personal privilege. It exists in the office, and it stems from the same governmental authority that bears ultimate responsibility for this and all other prosecutions. Consequently, Respondent Ehrlichman submits that the government must produce the subpoenaed tapes and documents or dismiss the prosecution.

CONCLUSION

For the reasons stated above, Respondent Ehrlichman respectfully submits that the government has a duty to

produce the material subpoenaed under the Federal Rules of Criminal Procedure Jencks Act, and *Brady v. Maryland*. Respondent Ehrlichman submits that that use of a subpoena to obtain these materials is proper so that in any event the materials subpoenaed must be produced or the prosecution dismissed.

RESPECTFULLY SUBMITTED,

FRATES, FLOYD, PEARSON, STEWART
PROENZA & RICHMAN
Twelfth Floor
Concord Building
66 West Flagler Street
Miami, Florida

By:

WILLIAM SNOW FRATES

By:

ANDREW C. HALL

and

SPENCER H. BOYER
HENRY H. JONES
Howard University School of Law
Washington, D.C.

By:

SPENCER H. BOYER

By:

HENRY H. JONES

OF COUNSEL

GERALD ISRAEL
University of Michigan College of Law
Ann Arbor, Michigan

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing respondent John Ehrlichman's brief on all counsel of record in this cause, June 24, 1974.

Supreme Court, U. S.
FILED
JUN 21 1974
MICHAEL RODAK, JR., CLERK

No. 73-1766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, *Petitioner*,

v.

RICHARD M. NIXON, President of the United States, ET AL., *Respondents*

BRIEF FOR RESPONDENT GORDON STRACHAN

JOHN M. BRAY
FRANCIS X. LILLY
ARENT, FOX, KINTNER,
PLOTKIN & KAHN
1815 H Street, N. W.
Washington, D. C. 20006
Attorneys for Respondent,
Gordon Strachan

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
STATEMENT	2
ARGUMENT	3
CONCLUSION	7

CITATIONS

CASES:

Brady v. *Maryland*, 373 U.S. 83 (1963)	5, 6
Giles v. *Maryland*, 386 U.S. 66 (1967)	5
Levin v. *Clark*, 408 F.2d 1209 (D.C. Cir. 1967)	5
United States v. *Brandt*, 439 F.2d 642 (D.C. Cir. 1971)	5
United States v. *Butler*, — F.2d — (D.C. Cir. decided April 16, 1974)	5
United States v. *Deutsch*, 475 F.2d 55 (5th Cir. 1973)	5
United States v. *Mitchell, et al.*, (D. D.C. Crim. No. 74-110)	2

RULES AND REGULATIONS

Rule 16, Federal Rules of Criminal Procedure	2
Rule 17, Federal Rules of Criminal Procedure	1, 3, 4
Department of Justice Order No. 551-73	6
Department of Justice Order No. 554-73	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1766

UNITED STATES OF AMERICA, *Petitioner,*

v.

RICHARD M. NIXON, President of the United States, ET AL., *Respondents*

BRIEF FOR RESPONDENT GORDON STRACHAN

QUESTIONS PRESENTED

In addition to those questions presented by the Special Prosecutor in his Petition for Writ of Certiorari the following questions are presented for review by Respondent Gordon Strachan ("Strachan").

1. Whether, under the Fifth and Sixth Amendments to the United States Constitution and Rule 17(c), Federal Rules of Criminal Procedure, materials producible by the President of the United States in

response to a trial subpoena issuedat the request of the Special Prosecutor, must also be nade available to all other "parties and their attorneys", including the defendants, for their inspection and use in the criminal proceeding in which the subpoenais issued.

2. Whether, if the subpoenaed materials are not producible in response to a subpoena issued on behalf of the Special Prosecutor, a member of the same branch of government as the President, they are nevertheless required to be produced in response to a motion filed by or a subpoena issued on behalf of a defendant in the criminal proceeding;

3. Whether, under the Fifth and Sixth Amendments to the Constitution and Rue 16, Federal Rules of Criminal Procedure, the Executive Branch of the United States government, including both the President and the Special Prosecutor, has a unitary duty to respond to such a motion or subpoena of a defendant and to supply him with all relevant or exculpatory material in the possession or under the control of the President and the Special Prosecutor; or, in the alternative, whether the President has a duty to allow a defendant and his attorney access to White House files to enable him to identify and obtain exculpatory material therein for use in his defense

STATEMENT OF THECASE

In addition to the Statement contained in the Special Prosecutor's Petition for Writ, Respondent Strachan presents the following additional facts.

On May 1, 1974, in *United States* v. *Mitchell, et al.*, (D. D.C. Crim. No. 74-110), Strachan filed a Motion for Amendment of the Order for Issuance of Subpoena requesting the district court to provide in its order that the subpoenaed materials be made available to all parties and their attorneys and not merely to the Special Prosecutor. Also, subsequent to the filing of the President's Special Appearance and Motion to Quash the Subpoena, Strachan filed on May 10, 1974, a Motion for Order Directing the Issuance of a Subpoena to require the President to produce certain materials alleged to be relevant, material or exculpatory and asking that Strachan's requested subpoena be issued only if the district court should decide that such materials were not required to be produced by the government in response to Strachan's motion for discovery filed May 1, 1974, or if the Special Prosecutor's subpoena were abandoned.

ARGUMENT

1. Strachan Is Entitled To Access To All Items Listed in the Special Prosecutor's Subpoena and in His Own Discovery Requests Even If the President Is Immune To Subpoena by the Special Prosecutor

In the event that this Court decides that the President is subject to a judicial order directing compliance with a subpoena duces tecum in the criminal case involved herein, then Strachan should be allowed access to those materials to the extent that such materials are within the purview of Rule 17(c). The Rule provides that materials subpoenaed under subsection (c) may be produced for inspection by the "parties" and does not restrict access to the party requesting the subpoena. Thus, although the Special Prosecutor requested and the district court ordered that only the government or the court have access to the materials produced, this Court should require that the order be modified to grant Strachan access to all such materials.

Furthermore, whether or not the President is immune to a subpoena issued on behalf of the Special Prosecutor, he should not be immune to a subpoena issued on behalf of Strachan who is an individual defendant and not a part of the Executive Branch. The Court should, therefore, resolve the question whether Strachan is entitled to the issuance of a Rule 17(c) subpoena to the President and whether relevant or exculpatory documents [1] in the possession of the President are producible pursuant to a discovery motion or a defense subpoena. Whatever the Court should rule with respect to whether the President is subject to subpoena by the Special Prosecutor, the Court may soon be asked to decide the closely related question whether a defendant may require production of such materials also and, if so, whether he may do so by motion [2] or whether he must serve a subpoena duces tecum.

[1] It is unrealistic at this stage to insist as the Special Prosecutor does that defendants justify their requests for access to their White House files or those of others in any greater detail than they have provided in their motion papers. To date, almost four months after indictment and little more than two months before trial, the defendants have been provided no discovery except for their own grand jury testimony and their own F.B.I. statements. Thus, while the Special Prosecutor with access to voluminous grand jury materials is able to annotate his subpoena requests, defendants remain, even now, at a severe handicap in attempting to do so.

[2] Although the district court in its May 20, 1974 Opinion and Order declined to rule whether discoverable or admissible evidence in the possession or control of the President is producible in response to a defense discovery motion, subsequent to this Court's granting of the Petition for the Writ herein, and during the course of pretrial oral arguments, the district court indicated that if materials that the defendants sought were not made available to the Special Prosecutor by the President, then the individual defendants would have to serve a subpoena for the desired materials on the President. Such a requirement would further burden defendants with time consuming and costly ancillary litigation.

Accordingly, since the Court has granted the Writ and expedited its consideration of the extent of the obligation of the President to produce evidence for a criminal proceeding, the Court should, we respectfully urge, in order to accomplish the compelling purpose which justified its departure from customary appellate procedure, treat the issues herein fully and require the materials to be produced and made available to the defendants for use in their defense.

2. Respondent Has a Right to the Production by the White House of Any Exculpatory Material

In *Brady* v. *Maryland*, 373 U.S. 83 (1963) and *Giles* v. *Maryland*, 386 U.S. 66 (1967), the Court ruled that due process requires the government to disclose exculpatory evidence to a defendant for use in his defense. *Brady, supra*, and its progeny leave little doubt that the government's obligation to disclose any arguably helpful evidence to a defendant applies to the entire government and not only to the prosecutive arm. See *United States* v. *Butler*, — F.2d —, (D.C. Cir., decided April 16, 1974); *United States* v. *Deutsch*, 475 F.2d 55 (5th Cir. 1973); *United States* v. *Brandt*, 439 F.2d 642 (D.C. Cir. 1971); *Levin* v. *Clark*, 408 F.2d 1209 (D.C. Cir. 1967).

In *United States* v. *Deutsch, supra*, the United States Attorney refused a discovery request to produce the personnel file of the government's key witness which was in the possession of the Post Office Department. The trial court ruled that the prosecutor cannot be compelled to disclose something that it does not have and it denied defendant's request for discovery. The Fifth Circuit reversed, stating:

> "[T]here is no suggestion in *Brady* that different 'arms' of government, particularly when so

closely connected as this one for the purpose of this case, are divisible entities." *Id.* at p. 57.

Here, the Special Prosecutor and the White House are at odds with respect to this case, but from a defendant's perspective the President and the Department of Justice are closely connected in a direct vertical line in the prosecution of federal offenses and are part of the same branch of government. While the Special Prosecutor may have sufficient independence under Department of Justice Orders No. 551-73 and 554-73 to permit him to subpoena the President, neither that independence nor the present hostile positions of the two are sufficient to preclude the application of the *Brady* requirement to both, and neither factor is sufficient to create additional legal, procedural or practical burdens for criminal defendants embroiled in this confrontation. Such internecine disputes between agencies, branches or officers of government are not unique to this case and, when they occur, they should not be permitted to make a defendant's burden more onerous or his constitutional rights less available.

Accordingly, the Court should require the government to comply with the rule of *Brady* v. *Maryland, supra,* with respect to materials in the possession or control of the President and should determine whether the legal and practical burdens of issuing and litigating over a defense subpoena therefor should be imposed on defendants.

Moreover, it is respectfully urged that the Court resolve these questions with sufficient finality to obviate the need for the return of Respondent to this Court in

each instance where the President or other governmental units deny him needed defense materials.

CONCLUSION

Respondent Gordon Strachan respectfully requests that the Court affirm the district court's order to the extent that it requires the production of the subpoenaed materials; that the Court require that the order be modified to permit inspection of the materials by all parties; that it order the production of all relevant, material or exculpatory material in the possession, custody or control of the President requested by Respondent Strachan by Motion, or, alternatively, that it determine the rights of Respondent Strachan to the issuance of a trial subpoena to the President and the obligation of the President to honor it.

Respectfully submitted,

JOHN M. BRAY
FRANCIS X. LILLY
ARENT, FOX, KINTNER,
PLOTKIN & KAHN
1815 H Street, N. W.
Washington, D. C. 20006
Attorneys for Respondent,
Gordon Strachan

June, 1974

INDEX

Argument: Page

I. The grand jury's action in designating the President as one of the unindicted co-conspirators was a responsible exercise of its constitutional powers 2

A. The grand jury's action was taken and disclosed in good faith and was unrelated to the impeachment inquiry before the House of Representatives .. 2

B. A federal grand jury has the constitutional power to identify an incumbent President as an unindicted co-conspirator in connection with its return of an indictment against other persons 11

1. The grand jury has broad and important powers as an independent institution of our government 12

2. An incumbent President may be named as an unindicted co-conspirator 16

3. It is an open and substantial question whether an incumbent President is subject to indictment 24

II. This dispute between the United States, represented by the Special Prosecutor, and the President—two distinct parties—presents a justiciable controversy 34

A. The Special Prosecutor has independent authority to maintain the prosecution in *United States* v. *Mitchell, et al.* 36

B. The assertion of executive privilege as a ground for refusing to produce evidence in a criminal prosecution does not present a political question and the validity of such a claim must be resolved by the courts 41

Argument—Continued Page

III. The Executive Branch does not have an absolute privilege to withhold evidence of confidential communications from a criminal prosecution.. 44

A. The valid interests of the Executive Branch in promoting candid intra-agency deliberations are fully protected by the qualified executive privilege regularly recognized and applied by the courts..... 44

B. The First Amendment erects no absolute privilege for the President to withhold relevant evidence..... 54

IV. The subpoenaed conversations are unprivileged because a *prima facie* showing has been made that they occurred in the course of a criminal conspiracy involving the President..... 58

V. There is a compelling public interest in trying the conspiracy charged in *United States* v. *Mitchell, et al.* upon all relevant and material evidence... 64

Conclusion..... 66

CITATIONS

Cases:

Anderson v. *Dunn*, 6 Wheat. (19 U.S.) 204..... 53

Anderson v. *United States*, — U.S. —— (42 U.S.L.W. 4815, June 3, 1974)..... 8

Application of American Society for Testing and Materials, 231 F. Supp. 686 (E.D. Pa. 1964)..... 22

Application of Johnson, 484 F. 2d 791 (7th Cir. 1973).. 12

Application of Turner & Newall, Ltd., 231 F. Supp. 728 (E.D. Pa. 1964)..... 22

Application of United Electrical, Radio & Machine Workers, 111 F. Supp. 858 (S.D.N.Y. 1953)..... 12

Baker v. *Carr*, 369 U.S. 186..... 41–42

Beavers v. *Henkel*, 194 U.S. 73..... 21, 63

Berger v. *United States*, 295 U.S. 78..... 23, 38

Beverly v. *United States*, 5th Cir., No. 73-2027..... 22

Boyd v. *United States*, 116 U.S. 616..... 55

Brady v. *Maryland*, 373 U.S. 83..... 40, 64

Branzburg v. *Hayes*, 408 U.S. 665..... 13, 15, 56–58

Carbo v. *United States*, 314 F. 2d 718 (9th Cir. 1963), cert. denied, 377 U.S. 953..... 61

Cases—Continued Page

Charge to Grand Jury, 30 Fed. Cas. 998 (No. 18, 257) (C.C.D. Md. 1836)..... 60

Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402..... 48

Clark v. *United States*, 289 U.S. 1..... 43, 52, 58, 59, 62, 64

Coleman v. *Burnett*, 477 F. 2d 1187 (D.C. Cir. 1973).. 61

Costello v. *United States*, 350 U.S. 359..... 13, 15

Couch v. *United States*, 409 U.S. 322..... 55

Environmental Protection Agency v. *Mink*, 410 U.S. 73.. 41, 43

Estrella-Ortega v. *United States*, 423 F. 2d 509 (9th Cir. 1970)..... 41

Ewing v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594.. 21, 63

Ex parte Bain, 121 U.S. 1..... 13

Ex parte United States, 287 U.S. 241..... 21, 63

Farnsworth v. *Sanford*, 115 F. 2d 375 (5th Cir. 1940), cert. denied, 313 U.S. 586..... 18–19

Farnsworth v. *Zerbst*, 98 F. 2d 541 (5th Cir. 1938), cert. denied, 307 U.S. 642..... 18

Gaither v. *United States*, 413 F. 2d 1061 (D.C. Cir. 1969)..... 15, 16

Garrison v. *Louisiana*, 379 U.S. 64..... 23

Gilligan v. *Morgan*, 413 U.S. 1..... 43

Gov't. of Virgin Islands v. *Parrott*, 476 F. 2d 1058 (3d Cir. 1973), cert. denied, 414 U.S. 871..... 4

Gravel v. *United States*, 408 U.S. 606..... 15, 19–20, 29, 53

Griswold v. *Connecticut*, 381 U.S. 479..... 55

Haldeman v. *Sirica*, — F. 2d —— (Nos. 74-1364, 74-1368) (D.C. Cir. March 27, 1974)..... 6

Hale v. *Henkel*, 201 U.S. 43..... 55

Hammond v. *Brown*, 323 F. Supp. 326 (N.D. Ohio), affirmed, 450 F. 2d 480 (6th Cir. 1971)..... 12

Hannah v. *Larche*, 363 U.S. 420..... 13

Holt v. *United States*, 218 U.S. 245..... 15

Humphrey's Executor v. *United States*, 295 U.S. 602.... 38

In re Grand Jury Proceedings, 479 F. 2d 458 (5th Cir. 1973)..... 12

In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon, 360 F. Supp. 1 (D.D.C. 1973).. 45, 55

In re Miller, 17 Fed. Cas. 295 (No. 9,552) (C.C.D. Ind. 1879)..... 15

In re Presentment of Special Grand Jury, January 1969, 315 F. Supp. 662 (D. Md. 1970)..... 12

Cases—Continued

	Page
In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to House of Representatives, 370 F. Supp. 1219 (D.D.C. 1974)	5–6
Jay v. *Boyd*, 351 U.S. 345	36
Johnson v. *United States*, 333 U.S. 46	41
Katz v. *United States*, 389 U.S. 347	55
Kotteakos v. *United States*, 328 U.S. 750	17
Longford v. *United States*, 101 U.S. 341	34
Lawn v. *United States*, 355 U.S. 339	15
Lego v. *Twomey*, 404 U.S. 477	61
Levine v. *United States*, 362 U.S. 610	13
Lutwak v. *United States*, 344 U.S. 604	8
Marbury v. *Madison*, 1 Cranch (5 U.S.) 137	35
Monitor Patriot Co. v. *Roy*, 401 U.S. 265	23
Myers v. *United States*, 272 U.S. 52	38
NAACP v. *Alabama*, 357 U.S. 449	55
New York Times Co. v. *United States*, 403 U.S. 713	45
Nixon v. *Herndon*, 273 U.S. 536	42
Nixon v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973)	13, 37, 46, 59, 65
Powell v. *McCormack*, 395 U.S. 486	42, 43
Rogers v. *United States*, 340 U.S. 367	8
Rose v. *McNamara*, 375 F. 2d 924	36
Ross v. *Texas*, 474 F. 2d 1150 (5th Cir. 1973), cert. denied, 414 U.S. 850	65
Roviaro v. *United States*, 353 U.S. 53	41, 43, 47, 64
Sampson v. *Murray*, — U.S. —— (42 U.S.L.W. 4221, Feb. 19, 1974)	35
Sardino v. *Federal Reserve Bank*, 361 F. 2d 106 (2d Cir. 1966), cert. denied, 385 U.S. 898	36
Secretary of Agriculture v. *United States*, 350 U.S. 162	39
Service v. *Dulles*, 354 U.S. 363	35
Stillman v. *United States*, 177 F. 2d 607 (9th Cir. 1949)	4
Troublefield v. *United States*, 372 F. 2d 912 (D.C. Cir. 1966)	41

Cases—Continued

	Page
United States v. *Agueci*, 310 F. 2d 817 (2d Cir. 1962), cert. denied, 372 U.S. 959	17
United States v. *Andolschek*, 142 F. 2d 503 (2d Cir. 1944)	64
United States v. *Breweter*, 408 U.S. 501	29, 52
United States v. *Burr*, 25 Fed. Cas. 30 (No. 14692d) (C.C.D. Va. 1807)	47, 50–51
United States v. *Calandra*, 414 U.S. 338	14, 22
United States v. *Connelly*, 129 F. Supp. 786 (D. Minn. 1955)	12
United States v. *Cooper*, 25 Fed. Cas. 631 (No. 14865) (C.C.D. Pa. 1800)	48
United States v. *Cooper*, 4 Dall. (4 U.S.) 341	53
United States v. *Cox*, 342 F. 2d 167 (5th Cir. 1965), cert. denied, 381 U.S. 935	15, 16
United States v. *Debrow*, 346 U.S. 374	8
United States v. *Deutsch*, 475 F. 2d 55 (5th Cir. 1973)	64
United States v. *Dionisio*, 410 U.S. 1	7, 13
United States v. *Edwards*, 366 F. 2d 853 (2d Cir. 1966)	17
United States v. *Ehrlichman*, D.D.C. Crim. No. 74–116	65
United States v. *Geaney*, 417 F. 2d 1116 (2d Cir. 1969), cert. denied, 397 U.S. 1028	61
United States v. *General Motors Corp.*, 352 F. Supp. 1071 (S.D. Mich. 1973)	21
United States v. *ICC*, 337 U.S. 426	39
United States v. *Isaacs and Kerner*, 493 F. 2d 1124, cert. denied,—U.S.——(June 17, 1974)	26–27
United States v. *Johnson*, 319 U.S. 503	4
United States v. *Johnson*, 337 F. 2d 180 (4th Cir. 1964), aff'd and remanded, 383 U.S. 169	19, 29
United States v. *Lutwak*, 195 F. 2d 748 (7th Cir. 1952), affirmed, 344 U.S. 604	41
United States v. *Manton*, 107 F. 2d 834 (2d Cir. 1939), cert. denied, 309 U.S. 664	51–52
United States v. *Marine Bancorporation, Inc.*, — U.S. — (June 26, 1974)	39
United States v. *Matlock*, — U.S. — (42 U.S.L.W. 4252, Feb. 20, 1974)	61
United States v. *Mitchell, et al.*, D.D.C. Crim. No. 74–110	3, 12, 38, 40, 64, 66
United States v. *Penney*, 416 F. 2d 850 (6th Cir. 1969), cert. denied, 398 U.S. 932	17

Cases—Continued

Page

United States v. *Pilnick*, 267 F. Supp. 791 (S.D.N.Y. 1967) 8
United States v. *Reynolds*, 345 U.S. 1 ..... 41, 43, 47
United States v. *Richardson*, — U.S. ——(June 25, 1974) 53
United States v. *Smyth*, 104 F. Supp. 283 (N.D. Calif. 1952) 15
Wood v. *Georgia*, 373 U.S. 375 ..... 13, 15, 22, 23

Constitution, statutes, rules, and regulations:

Article I, Section 3, clause 7 ..... 25, 27
Article I, Section 5, clause 3 53
Article I, Section 6, clause 1 52–53
Article II, Section 2, clause 1 54
Article II, Section 4 27
Article III 35
First Amendment 54–57
Fourth Amendment 55, 56
Fifth Amendment 56, 57
Twenty-fifth Amendment 32
18 U.S.C. 3500 64
28 U.S.C. 516 30
28 U.S.C. 519 30
28 U.S.C. 547 30
28 U.S.C. 1861–1871 13
Pub. L. 93–172, 87 Stat. 691 4
Rule 6, Federal Rules of Criminal Procedure 4, 5
Rule 16, Federal Rules of Criminal Procedure 64
Rule 17, Federal Rules of Criminal Procedure 64
Rule 48(a), Federal Rules of Criminal Procedure 40
Rule 614(a), Proposed Federal Rules of Evidence 41

Miscellaneous:

An Analysis of the Constitutional Standard for Presidential Impeachment: Analysis Submitted to the House Committee on the Judiciary by Attorneys for the President, 10 Weekly Compilation of Presidential Documents 270 (March 4, 1970) 33
14 Annals of Congress 431 (8th Cong., 2d Sess, 1805) 25–26
Attorney General's Papers: Letters Received from the State Department, January 12, 1818, Record Group 60, National Archives 51
Berger, *The President, Congress, and the Courts*, 83 Yale L.J. 1111 (1974) 25, 30, 50
116 Cong. Rec. 37,652 (Nov. 17, 1970) 53

Miscellaneous—Continued

Page

Constitutional Grounds for Presidential Impeachment: Report by the Staff of the Impeachment Inquiry, House Judiciary Committee, 93d Cong., 2d Sess. (Comm. Print, February 1974) 33
Cooper, *Account of the Trial of Thomas Cooper of Northumberland* (1800) 48–49
Curtis, *Constitutional History* (1889) 29, 30
Elliot, *The Debates of the Several State Conventions on the Adoption of the Federal Constitution* (2d ed. 1836) 26, 34
Farrand, *Records of the Federal Convention of 1787* (1911) 28
Letter from William Wirt to John Quincy Adams, January 13, 1818, in Attorney General's Opinions, Book A, Record Group 60, National Archives 51
Madison, *Debates in the Federal Convention* (1920 ed.) 29
McCormick, *Evidence* (2d ed. 1972) 62
Pollack & Maitland, *History of the English Law* (2d ed. 1909) 13
Rawle, *A View of the Constitution of the United States of America* (2d ed. 1829) 30, 33, 49, 50
Records of General Courts Martial and Courts of Inquiry of the Navy Department, Record Group 125, National Archives, Microfilm Publication M273 51
10 *Weekly Compilation of Presidential Documents* 452 (May 6, 1974) 56
Yankwich, *Charge to Grand Jury*, 17 F.R.D. 93 (1955) 60

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1766

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, ET AL., RESPONDENTS

No. 73-1834

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The Special Prosecutor, on behalf of the United States, submits this Reply Brief in response to the brief submitted by counsel for the President on June 21, 1974.

ARGUMENT

I

THE GRAND JURY'S ACTION IN DESIGNATING THE PRESIDENT AS ONE OF THE UNINDICTED CO-CONSPIRATORS WAS A RESPONSIBLE EXERCISE OF ITS CONSTITUTIONAL POWERS

In the district court, counsel for the President premised his motion to expunge the grand jury's action concerning the President on the argument that an incumbent President could not be indicted. In this Court, counsel also challenges the motives that led to that action. These are false issues that should be dismissed at once so that the Court can address on the merits the question on which certiorari was granted in No. 73–1834.

A. THE GRAND JURY'S ACTION WAS TAKEN AND DISCLOSED IN GOOD FAITH AND WAS UNRELATED TO THE IMPEACHMENT INQUIRY BEFORE THE HOUSE OF REPRESENTATIVES

One of the contentions that is repeated throughout the President's brief in this Court is that "court process is being used as a discovery tool for the impeachment proceedings" now pending before the Committee on the Judiciary of the House of Representatives (P. Br. 13[1]). The argument is advanced that the courts are being used "as a back-door route to circumvent the constitutional procedures of an impeachment inquiry, and thus [being] intruded into the political

[1] "P. Br." refers to the printed brief submitted by counsel for the President on June 25 in substitution for the brief filed on June 21. "Br." refers to the main brief for the United States.

thicket in this most solemn of political processes" (P. Br. 15). Later, counsel charges that our submissions, relying in part on the grand jury's finding, "base a desire for evidence on a strategem which attempts to cripple the Presidency" and constitute "a grotesque attempt to abuse the process of the judicial branch of government" (P. Br. 114). These assertions are unfounded.

The grand jury's determination that there is evidence that the President was one of the conspirators involved in the conspiracy alleged in the indictment in *United States* v. *Mitchell, et al.*, D.D.C. No. 74–110 (A. 5A–14A), and the government's reliance on that action in opposing the President's motion to quash the subpoena *duces tecum* were made in good faith, within the legitimate sphere of constitutional authority. We shall discuss below the reasons why the President can be identified constitutionally as an unindicted co-conspirator by a federal grand jury (see pp. 16–23, *infra*), but we consider it important to set the record straight on the reasons for its action and the context of the disclosure of that action. The record shows that both the grand jury and the Special Prosecutor have been sensitive to the President's position and have endeavored to avoid unnecessary interference with the constitutional processes being pursued simultaneously by the House Judiciary Committee.

By the time it returned the conspiracy indictment in this case on March 1, 1974, the grand jury had been in session since June 5, 1972, and had first heard Watergate-related evidence shortly after the June 17

1972 break-in.[2] It resumed its investigation in March 1973 after the trial and conviction of the seven Watergate burglars and pursued this inquiry virtually full-time until the return of the indictment. During the course of its investigation, it received a considerable amount of information concerning the President's role in the alleged conspiracy to obstruct justice and to defraud the United States charged in Count I. As we pointed out in our principal brief, out of "deference to the President's public position" (Br. 98 n. 76), the grand jury elected to take no action publicly that would cause needless embarrassment to the President at the time the Judiciary Committee was conducting its inquiry.

But as an independent constitutional institution with grave public responsibilities, the grand jury was not free to ignore the evidence it had heard. Hence, it decided to recommend to the chief judge of the district court that the material evidence concerning the President be transmitted to the Judiciary Committee. The Special Prosecutor, as the grand jury's counsel, notified the chief judge of this intended

[2] Counsel for the President notes (P. Br. 6 n. 3) that the validity of the indictment has been challenged by the defendants in this case on the ground that the grand jury's term had expired under Rule 6(g), Fed. R. Crim. P. However, by act of Congress (Pub. L. 93–172, 87 Stat. 691), the term of the grand jury was extended until June 4, 1974, (subject to further extension by the court) to allow it to continue and conclude this investigation. This legislation was unquestionably valid. See *United States* v. *Johnson*, 319 U.S. 503, 507–513; *Stillman* v. *United States*, 177 F. 2d 607, 611 n. 2 (9th Cir. 1949). Cf. *Government of Virgin Islands* v. *Parrott*, 476 F. 2d 1058, 1060–61 (3d Cir. 1973), cert. denied, 414 U.S. 871 (later statute prevails over rule).

action, and, at the time the indictment was received, the chief judge received and sealed the grand jury's "Report and Recommendation" together with the accompanying evidence. The "Report and Recommendation" stated that the grand jury was "deferring" to the "primary jurisdiction" of the House. Before taking any action, the court gave counsel for the President and counsel for the defendants (as well as counsel for the Judiciary Committee) an opportunity to submit written memoranda and to argue the matter orally at a hearing. Counsel for the President was allowed to inspect the "Report and Recommendation" and stated that the President had no objection to the court's granting the grand jury's request that the evidence be transmitted. See *In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to House of Representatives,* 370 F. Supp. 1219, 1221 & nn. 1, 2 (D.D.C. 1974), narrating these developments. In fact, at the hearing before the district court, counsel stated that it was the President's own decision to make available to the House directly any evidence he had furnished to the grand jury. Transcript of Hearing, March 6, 1974, at 3 (D.D.C. Misc. No. 74–21).

In determining that he would exercise his discretion under Rule 6(e) of the Federal Rules of Criminal Procedure and would transmit the grand jury evidence to the House, the judge found that the grand jury's report "draws no accusatory conclusions. It deprives

no one of an official forum in which to respond." 370 F. Supp. at 1226.[3] The court also noted (*ibid*):

> It contains no recommendation, advice or statements that infringe on the prerogatives of other branches of government. Indeed, its only recommendation is to the Court, and rather than injuring separation of powers principles, the Jury sustains them by lending its aid to the House in the exercise of that body's constitutional jurisdiction. It renders no moral or social judgments. The Report is a simple and straightforward compilation of information gathered by the Grand Jury, and no more.

When several defendants filed petitions for writs of mandamus or prohibition to preclude the transmission of the evidence, the court of appeals called for the "Report and Recommendation" and the accompanying evidence. With the materials before the court *en banc*, the court of appeals denied the petitions, noting that "the President of the United States, who is described by all parties as the focus of the report and who presumably would have the greatest interest in its disposition, has interposed no objection to the District Court's action." *Haldeman* v. *Sirica*, —— F. 2d ——, —— (Nos. 74–1364, 74-1368) (D.C. Cir. March 27, 1974). The court did not challenge the district court's finding that the grand jury's proposed submission to the House was not accusatory and involved merely a compilation of evidence. When no further review was

[3] The President's motion and exhibits before this Court concerning the grand jury evidence show that the House Judiciary Committee is giving counsel for the President access to the grand jury materials placed on the record before the Committee.

sought, the evidence thereafter was transmitted to the House.

The grand jury's action identifying the President as a co-conspirator, now at issue before this Court, is entirely unrelated. This determination was made as an integral part of the grand jury's performance of its own constitutional functions. In making its determination, the grand jury was not focusing on the President *qua* President. Rather, it was discharging its sworn duty to determine "whether a crime has been committed and who has committed it." *United States* v. *Dionisio*, 410 U.S. 1, 15. It decided to indict seven persons and to state in the indictment simply its belief that there were other co-conspirators "to the Grand Jury known and unknown" (A. 7A), but without publicly identifying those who were known. At the same time, however, the grand jury recorded for later disclosure in connection with the criminal trial its determination of the identity of each of the known co-conspirators, including "Richard M. Nixon". It takes no extended discussion to show that this action, while unquestionably painful for all parties concerned, was in furtherance of legitimate and, indeed, compelling purposes.

Counsel for the President is simply wrong in alleging that the naming of the President was a "stratagem" or "device" to "nullify the President's claim of executive privilege" (P. Br. 113, 114). This claim ignores the basic principle that the grand jury's function is to return a "true bill" that fully and fairly alleges what it believes the evidence shows. Moreover, in light of the apparent thrust of the evidence here,

the naming of the President at some stage prior to trial was virtually inevitable. While it is not mandatory that unindicted conspirators be named in the indictment, see *Rogers* v. *United States,* 340 U.S. 367, 375, such information commonly must be furnished by the prosecution in its bill of particulars. See, *e.g., United States* v *Pilnick,* 267 F. Supp. 791, 801 (S.D. N.Y. 1967); cf. *United States* v. *Debrow,* 346 U.S. 374, 378.

A specific finding by the grand jury on the identity of the known but unindicted co-conspirators was especially important here to furnish additional protection against the possibility of unfounded accusations, particularly when one of the persons seemingly involved was the President. This course makes it clear that the grand jury—the "conscience of the community"—and not merely the prosecutor, made this important determination in the first instance.

Furthermore, the identification of each co-conspirator—regardless of his station—is a prerequisite to making his declarations in furtherance of the conspiracy admissible against the other conspirators. See *Lutwak* v. *United States,* 344 U.S. 604, 617–19; *Anderson* v. *United States,* — U.S. — (42 U.S.L.W. 4815, June 3, 1974). This will be an essential consideration in assuring a trial upon all material and important evidence. It is well within a prosecutor's proper discharge of his duties to pursue a case to trial by relying on the grand jury's *prima facie* determination of the membership in the alleged conspiracy, and unless good reason exists to the contrary, he is obligated to do so. It is for these reasons that the grand jury properly made its judgments on the question, and that the Special Prosecutor was authorized to disclose its action

to the court and the parties to this case in connection with the post-indictment proceedings.

Nor is there any foundation for the insinuation that the grand jury's determination regarding President Nixon was intended to prejudice the President's position before the country or before the Judiciary Committee. As noted above, when the grand jury transmitted the material evidence concerning the President to the Judiciary Committee, it carefully disavowed any assessment of its significance insofar as the President's official status was concerned, and, as the district court and court of appeals agreed, the grand jury abstained from offering the House its views on the thrust of the evidence. In discharging its own constitutional functions and in appraising the involvement of "Richard M. Nixon" (and other unindicted co-conspirators) in the offenses for which it returned an indictment, it also endeavored to respect the President's official position by maintaining its determination as to *all* unindicted co-conspirators in secret. That vote was taken on February 25, 1974. It was anticipated that disclosure of the identity of the co-conspirators, including Richard M. Nixon, would be deferred many months, at least until pre-trial discovery proceedings were under way and a bill of particulars filed, by which time the impeachment proceedings might have been concluded.

When, however, the President refused to comply with the instant subpoena for evidence to be used at the trial on the indictment and on May 1, 1974, moved to quash it, claiming "executive privilege", it became appropriate, if not obligatory, to invoke the grand jury's finding in order to permit the court to make an

551-892—74——2

informed determination whether the President could lawfully invoke that public privilege to withhold the evidence sought. As the record before the Court reflects, counsel for the President was advised of the grand jury's action before any answering papers were filed by the Special Prosecutor and, again out of regard for the President's position, the Special Prosecutor suggested to the President's counsel that the matter should be handled *in camera.*[4] The President's counsel then joined in the Special Prosecutor's motion to seal all pleadings reflecting the grand jury's action and to hold oral argument *in camera.* The district court, after an *in camera* hearing with defense counsel present, accepted this suggestion, and further proceedings were conducted in this extraordinary way—to avoid, insofar as possible, having the proceedings in this important criminal prosecution affect the concurrent proceedings before the House.

In denying the President's motion to quash, the district court's opinion was carefully guarded in referring to the significance of the sealed material (Pet. App. 22–23). Because of the number of persons who were necessarily privy to this information, however, news media were able to piece together the essentials of what had been disclosed and litigated *in camera,* and on June 6, 1974, counsel for the President publicly confirmed the reports about the grand jury's action. But the record shows that the grand jury, the district court and the Special Prosecutor successfully maintained the grand jury's determination in strict

[4] Counsel for the President commended the Special Prosecutor for suggesting this procedure. Transcript of *In Camera* Hearing on May 8, 1974, at 4.

confidence for several months in order to avoid unnecessary impact upon the Judiciary Committee's inquiry. It is hardly fair to say, therefore, as counsel for the President does, that the grand jury and Special Prosecutor were attempting "to subvert and prejudice the legitimate constitutional procedure of impeachment" (P. Br. 108).

B. A FEDERAL GRAND JURY HAS THE CONSTITUTIONAL POWER TO IDENTIFY AN INCUMBENT PRESIDENT AS AN UNINDICTED CO-CONSPIRATOR IN CONNECTION WITH ITS RETURN OF AN INDICTMENT AGAINST OTHER PERSONS

Upon analysis of the merits, the Court will conclude, we believe, that counsel's assertions that an incumbent President cannot be named an unindicted co-conspirator are unpersuasive. The federal grand jury's constitutional powers and responsibilities are sweeping. Although it is by no means clear that a President is immune from indictment prior to impeachment, conviction, and removal from office, the practical arguments in favor of that proposition cannot fairly be stretched to confer immunity on the President from being identified as an *unindicted* co-conspirator, when it is necessary to do so in connection with criminal proceedings against persons unquestionably liable to indictment. Since the naming of unindicted co-conspirators is a fair and common practice and was required here to outline the full range of the alleged conspiracy, the district court's refusal to expunge its determination was fully justified.[5]

[5] Even assuming, for some legal reason, that the grand jury's naming of the President as an unindicted co-conspirator is ineffective, it does not follow that the court below abused its discretion in denying the motion to expunge. Expunction of a formal finding by a grand jury, whose existence and powers are

(Continued)

1. The grand jury has broad and important powers as an independent institution of our government

Only a brief discussion is required to establish the unique and important role of the grand jury in the American judicial system. Though an arm of the court,

(Continued)
constitutionally established, is a drastic remedy, to be granted only after a careful weighing of the legitimacy of the grand jury's action, the strength of the public interest in an accurate public record of proceedings, and the degree of prejudice to those persons affected by full disclosure. See *Application of Johnson*, 484 F. 2d 791, 797 (7th Cir. 1973); *In re Grand Jury Proceedings*, 479 F. 2d 458, 460 n. 2 (5th Cir. 1973).

The President's principal argument below was that expunction was necessary because of the damage which disclosure would cause to the fairness of the impeachment inquiry being conducted by the House of Representatives. *Reply to Memorandum in Opposition to the Motion to Quash Subpoena Duces Tecum* 25–27 (D.D.C. May 13, 1974) (Crim. No. 74–110). That concern has now become academic because of the public disclosure of the grand jury's action. Any resulting harm to him before the House or in the eyes of the public is now unfortunately an "accomplished fact." *Application of Johnson*, *supra*, 484 F. 2d at 797. See also *United States* v. *Connelly*, 129 F. Supp. 786, 787 (D. Minn. 1955) (refusal to expunge grand jury report that had already been widely publicized).

The listing of specific co-conspirators pursuant to the finding and return of an indictment was clearly within the traditional confines of grand jury power. The grand jury here did not go beyond this function by making merely gratuitous expressions of views about a general societal condition; or concerning matters outside its area of expertise. Compare *Application of United Electrical, Radio & Machine Workers*, 111 F. Supp. 858 (S.D.N.Y. 1953). Cf. *Hammond* v. *Brown*, 323 F. Supp. 326, 337 (N.D. Ohio), affirmed, 450 F. 2d 480 (6th Cir. 1971). Certainly the grand jury's action here is not clearly *ultra vires*. There is, in addition, a legitimate public purpose in reporting the fact that serious criminal charges against a government official have been made. *In re Presentment of Special Grand Jury, January 1969*, 315 F. Supp. 662, 678 (D. Md. 1970).

The district judge, therefore, did not abuse his discretion in refusing to expunge the finding.

Levine v. *United States*, 362 U.S. 610, 617, the grand jury has an independent constitutional basis in the Fifth Amendment and has functions and prerogatives which are "rooted in long centuries of Anglo-American history." *Hannah* v. *Larche*, 363 U.S. 420, 490 (Frankfurter, J., concurring). The adoption of the grand jury "in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice." *Costello* v. *United States*, 350 U.S. 359, 362. See also *Branzburg* v. *Hayes*, 408 U.S. 665, 687.

Like its English progenitor, the American grand jury is designed to reflect the conscience of the community. 2 Pollock & Maitland, *History of the English Law* 642 (2d ed. 1909). Its members are "selected from the body of the people"[6] and are "pledged to indict no one because of prejudice and to free no one because of special favor." *Costello* v. *United States*, *supra*, 350 U.S. at 362.[7] Its first and only obligation is to the truth—to determine, unhindered by external influence or supervision, "whether a crime has been committed and who has committed it." *United States* v. *Dionisio*, *supra*, 410 U.S. at 15. See also *Wood* v. *Georgia*, 370 U.S. 375, 390; *Ex parte Bain*, 121 U.S. 1, 11.

[6] See the Jury Selection and Service Act of 1968, 28 U.S.C. 1861–1871.

[7] Immediately after the President procured the dismissal of Special Prosecutor Cox when he refused to obey the President's instruction not to seek enforcement of the grand jury subpoena *duces tecum* that had been upheld by the court of appeals in *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973), Chief Judge Sirica summoned the two grand juries that were

(Continued)

Reflecting this "special role in insuring fair and effective law enforcement," *United States* v. *Calandra*, 414 U.S. 338, 343 (1974), the grand jury's powers of inquiry are extremely broad. It has a right to every man's evidence, and proceeds unhindered by the var-

(Continued)
then conducting investigations with the assistance of the Special Prosecutor, including the grand jury that took the action now being challenged by the President. In open court on October 23, 1973, the chief judge instructed them:

"You are advised first, that the grand juries on which you serve remain operative and intact. You are still grand jurors, and the grand juries you constitute still function. In this regard you should be aware that the oath you took upon entering this service remains binding. You must all be especially careful at this time to fully and strictly adhere to that oath which states:

"You and each of you as a member of the grand jury for the District of Columbia, do solemnly swear that you will diligently, fully, and impartially inquire into and true presentment make of all offenses which shall come to your knowledge and of which the United States District Court for the District of Columbia has cognizance; that you will present no one from hatred or malice nor leave anyone unpresented from fear, favor, affection, reward, or hope of reward; that the counsel of the Attorney of the United States, your fellows and your own, you will keep secret and that you will to the best of your ability perform all the duties enjoined upon you as a grand juror, so help you God.

* * * * * * *

"This brings me to my second point: these two grand juries *will* continue to function and pursue their work. You are not dismissed and will not be dismissed except as provided by law upon the completion of your work or the conclusion of your term. Your service to date, I realize, has occasioned personal sacrifices for many of you and inconvenience for all of you. You did not choose this assignment; it is an obligation of citizenship which it fell your lot to bear at this time, and you have borne it well. The Court and the country are grateful to you. Nevertheless, you must be prepared to press forward. We rely on your continued integrity and perseverance." (Emphasis in original.)

ious evidentiary and exclusionary rules which apply at trial. *Branzburg* v. *Hayes, supra; Lawn* v. *United States*, 355 U.S. 339; *Costello* v. *United States, supra; Holt* v. *United States*, 218 U.S. 245. See also *Gravel* v. *United States*, 408 U.S. 606, 628, where this Court allowed wide scope to a grand jury's investigation involving a United States Senator, despite claims that such matters were immune from inquiry under the Speech or Debate Clause. As the courts have frequently noted, society's interests are best served by a grand jury investigation which is "thorough and extensive." *Wood* v. *Georgia, supra*, 370 U.S. at 392.

The grand jury has the unreviewable independence to refuse to return an indictment requested by the prosecution. *Gaither* v. *United States*, 413 F. 2d 1061, 1066 (D.C. Cir. 1969). Conversely, even direct instructions from the President cannot prevent the grand jury "from making the fullest investigation into the matter" and "from returning an indictment against the accused if the evidence should warrant it * * *." *In re Miller*, 17 Fed. Cas. 295 (No. 9,552) (C.C.D. Ind. 1879). For as the court instructed the grand jury in that case, it was free to disregard the instructions from President Hayes to the prosecutor to restrict its inquiry: "The moment the executive is allowed to control the action of the courts in the administration of criminal justice their independence is gone." See also *United States* v. *Cox*, 342 F. 2d 167, 174–80 (5th Cir. 1965), cert. denied, 381 U.S. 935 (opinion of Rives, Gewin, and Bell, JJ.); *United States* v. *Smyth*, 104 F. Supp. 283, 293–295 (N.D. Calif. 1952).

Thus, in our jurisprudence this body of citizens, randomly selected, beholden neither to court nor prosecutor, trusted historically to protect the individual against unwarranted governmental charges, but sworn to ferret out criminality by the exalted and powerful as well as by the humble and weak, must be able to take cognizance of *all* possible violators of the laws of the United States.

2. An incumbent President may be named as an unindicted co-conspirator

Although we shall indicate below why it is not at all clear that an incumbent President may not be named as a *defendant* in a criminal indictment, this case does not turn on that issue and the Court need not decide it. Even assuming *arguendo* that an incumbent President has some implicit constitutional immunity that prevents a federal grand jury from indicting him, he nevertheless may be named as an *unindicted* co-conspirator under the traditional grand jury power to investigate and charge conspiracies that include co-conspirators who are not legally indictable. This power is part of the constitutional power to return indictments in the form and scope the grand jury determines is proper.[8] It includes the authority to indict a person and charge him with conspiring with a person who, for one reason or another, is immune from prosecution.

[8] *Gaither* v. *United States*, *supra*, 413 F. 2d at 1069; *United States* v. *Cox*, *supra*, 342 F. 2d at 181, 182.

It is not disputed, of course, that a grand jury has the power to name persons other than a President as unindicted co-conspirators. While no case in this Court has directly considered the existence of such power, it has long been commonplace for persons to be identified in this way in a conspiracy indictment. See, *e.g.*, *Kotteakos* v. *United States*, 328 U.S. 750, 752 n. 1; *United States* v. *Agueci*, 310 F. 2d 817, 820 (2d Cir. 1962), cert. denied, 372 U.S. 959; *United States* v. *Edwards*, 366 F. 2d 853, 858 (2d Cir. 1966). Indeed, it has been held proper to refuse to strike the names of 37 unindicted co-conspirators from an indictment. *United States* v. *Penney*, 416 F. 2d 850, 852 (6th Cir. 1969), cert. denied, 398 U.S. 932.

The grand jury has the right to decide whether to indict or not to indict particular persons and to decide what charge or charges such person or persons shall face. It may decline to indict a person in the face of sufficient evidence because of mitigating circumstances. In addition, some persons believed to be criminally involved may be immune from prosecution, legally or practically, for any one of numerous reasons: transactional or use immunity; prior acquittal or conviction; diplomatic immunity; incompetence; flight to a foreign sanctuary; pardon; expiration of a statute of limitations; or death. Accordingly, the grand jury has the right to charge some of the participants as defendants and to name others as unindicted co-conspirators. Even where some of the participants enjoy constitutional, legal, or practical immunity from being criminally prosecuted, neither the

grand jury nor the prosecution at trial is obliged to suppress all evidence of their complicity.

For example, in *Farnsworth* v. *Zerbst,* 98 F. 2d 541 (5th Cir. 1938), cert. denied, 307 U.S. 642, and *Farnsworth* v. *Sanford,* 115 F. 2d 375 (5th Cir. 1940), cert. denied, 313 U.S. 586, the court of appeals ruled that a person may be convicted and punished for a conspiracy even though his fellow conspirators were immune from prosecution because of the immunity attaching to representatives of foreign governments. There, the defendant, a naval officer, was charged with conspiring with two *named* Japanese diplomats to transmit defense secrets to a foreign government. He argued that the indictment was defective because he was charged with conspiring with persons who had diplomatic immunity from prosecution. In rejecting this argument, the court said (98 F. 2d at 544):

> If such persons in the United States join with a citizen of the United States in a conspiracy to commit a crime, though it be conceded that the foreign diplomat would not be indicted in the District Court, or even that he could not be, his immunity will not excuse the local citizen. At least two persons must join in an unlawful enterprise to constitute it a conspiracy. The statute expressly so says. But both need not be prosecuted, or prosecutable. One may die, may escape, or obtain a pardon; but the other remains guilty.

Later the court held that the case had not "affected" the diplomats in such a way as to deprive the lower

federal courts of jurisdiction over the matter, reasoning (115 F. 2d at 379):

> [W]e think that when the Japanese defendants were not arrested and Farnsworth was arraigned alone there was as complete a severance of the case against him as though he alone had been indicted. The case to be tried then in no substantial way affected the ex-attachés in Japan, or the Japanese Ambassador. Each of course would be concerned as the trial might involve reflections on the character and conduct of the ex-attachés, but the case in its results would not touch the person or goods or servants of any of them. * * * The ambassador's feelings, his integrity as a witness, and his standing as a man might all be involved, but he is held not affected.

In *United States* v. *Johnson,* 337 F. 2d 180 (4th Cir. 1964), aff'd and remanded, 383 U.S. 169, the court of appeals expressly held that the government could prosecute private individuals for conspiring to defraud the United States by bribing a Congressman to make a speech on the floor of the House, even though the prosecution required exploration of the Congressman's motivation for the speech and even though the Congressman himself was immune under the Speech or Debate Clause from prosecution on that theory. This Court also has implied that third-party witnesses may be questioned about the legislative acts of congressmen, despite the Speech or Debate Clause, where third-party crimes are the "proper concern of the grand jury or the Executive Branch" in its prosecutive capacity. *Gravel* v. *United States,* 408

U.S. 606, 629, n. 18. Thus, the mere fact that an official has a personal immunity from prosecution does not bar the prosecution from alleging and proving his complicity as part of a case against persons who have no such immunity.

In short, the jurisdiction of the grand jury to name unindicted co-conspirators is a necessary part of the power to charge defendants in a conspiracy case and is not restricted by any immunity a co-conspirator may enjoy not to be brought personally before the bar of justice to answer for the offense.

There is, we submit, no reason to make an exception for an incumbent President. We realize that the President is entrusted with awesome powers and responsibilities requiring his full attention. While indictment would require the President to spend time preparing a defense and, thus, would interfere to some extent with his attention to his public duties, the course the grand jury has followed here in naming the President as an unindicted co-conspirator cannot be regarded as equally burdensome. It is regrettable that the thrust of the evidence in the grand jury's view encompasses an incumbent President, but it would not be fair to our legal system or to the defendants and other unindicted co-conspirators to blunt the sweep of the evidence artificially by excluding one person, however prominent and important, while identifying all others.

We concede that any person—President or "ordinary" citizen— may suffer adverse consequences if he is named as an unindicted co-conspirator, whether in an indictment, in a bill of particulars or in testimony at a trial. But such consequences are an inevitable part

of the judicial process and do not justify prior judicial screening or complete silence. As Justice Douglas observed for the Court in *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599:

> The impact of the initiation of judicial proceedings is often serious. Take the case of the grand jury. It returns an indictment against a man without a hearing. * * * As a result the defendant can be arrested and held for trial. See *Beavers* v. *Henkel*, 194 U.S. 73, 85; *Ex parte United States*, 287 U.S. 241, 250. The impact of an indictment is on the reputation or liberty of a man. The same is true where a prosecutor files an information charging violations of the law. The harm to property and business can also be incalculable by the mere institution of proceedings. Yet it has never been held that the hand of government must be stayed until the courts have an opportunity to determine whether the government is justified in instituting suit in the courts.

Similar considerations apply to the interests of persons who are brought into criminal proceedings collaterally, as unindicted co-conspirators. For example, in *United States* v. *General Motors Corp.*, 352 F. Supp. 1071 (S.D. Mich. 1973), the court denied a motion of the defendants in a conspiracy case under the Sherman Act to suppress a bill of particulars on the ground that numerous unindicted prominent persons named in the bill would be subjected to adverse publicity and embarrassment.[9]

---

[9] Unindicted co-conspirators have sometimes been afforded relief from being named in an indictment *after* a trial where the evidence showed that they were *not* in fact involved in the

(Continued)

This does not mean that a person has no protection against being named unfairly as a co-conspirator. His primary protection is in the finding of the grand jury that there is sufficient evidence to believe that the conspiracy as charged in the indictment existed. It also lies in the conscience of each member of a grand jury, the same protection that is applicable to an indicted defendant. As this Court stated in *Wood* v. *Georgia, supra,* 370 U.S. at 390:

> Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society for standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an

(Continued)
conspiracy charged. See *Application of American Society for Testing and Materials*, 231 F. Supp. 686 (E.D. Pa. 1964); *Application of Turner & Newall, Ltd.*, 231 F. Supp. 728 (E.D. Pa. 1964). See also *Beverly* v. *United States*, 5th Cir., No. 73-2027, pending on appeal, where persons named as unindicted co-conspirators are contending that their names should be expunged from a conspiracy indictment.

It is not unusual for persons tangentially involved in criminal proceedings to suffer adverse consequences. In many instances, an innocent witness may suffer some injury as a result of his testimony. As this Court explained in *United States* v. *Calandra, supra,* 414 U.S. at 345:

"The duty to testify may on occasion be burdensome and even embarrassing. It may cause injury to a witness' social and economic status. Yet the duty to testify has been regarded as 'so necessary to the administration of justice' that the witness' personal interest in privacy must yield to the public's overriding interest in full disclosure."

> intimidating power or by malice and personal ill will.

The scope of the indictment itself as returned by the grand jury and the duty of the United States Attorney to refrain from improper methods also afford protection to an individual from being wrongfully accused as a co-conspirator in the bill of particulars or the evidence. See *Berger* v. *United States,* 295 U.S. 78, 88.

While we readily concede that the naming of an incumbent President as an unindicted co-conspirator is a grave and solemn step and may cause public as well as private anguish, we submit that such action is not constitutionally proscribed. The answer to the constitutional question must be shaped by two postulates of our free society: that grand juries are ordinarily responsible [10] and that, in the public market place of ideas, the people can be trusted to assess the worth of charges and counter-charges, particularly where the acts of a public official are in dispute.[11] There is little reason to fear either that grand juries will accuse an incumbent President maliciously, or that, if they do, their charges will receive credit they do not deserve.

In light of the foregoing principles, we submit that the grand jury's action here was constitutionally legitimate.

[10] See, *e.g.*, *Wood* v. *Georgia, supra.*

[11] See, *e.g.*, *Garrison* v. *Louisiana*, 379 U.S. 64, 76-77; *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 273-277.

3. It is an open and substantial question whether an incumbent President is subject to indictment

Counsel for the President bases his argument against the constitutionality of the grand jury's action here on the premise that an incumbent President cannot be indicted (P. Br. 107–108). We believe we have just shown that the Court's consideration of the issue actually before the Court—whether a President can be named as an *unindicted* co-conspirator—does not require consideration of the assertion by counsel for the President that it cannot be "seriously disputed" that "a President may not be indicted while he is an incumbent" (P. Br. 95). Nevertheless, we cannot allow the assertion to stand uncontroverted. Thus, we outline the reasons why the President's major premise may be unsound, even though the Court need not decide the issue in order to reject the contention that the district court erred in refusing to expunge the grand jury's finding.

Resort to constitutional interpretation, history, and policy does not provide a definitive answer to the question of whether a sitting President enjoys absolute immunity from the ordinary processes of the criminal law. What we believe is clear is that nothing in the text of the Constitution or in its history—including close scrutiny of the background of relevant constitutional provisions and of the intent of the Framers—imposes any bar to indictment of an incumbent President. Primary support for such a prohibition must be found, if at all, in considerations of constitutional and public policy including competing factors such as the nature and role of the Presidency

in our constitutional system, the importance of the administration of criminal justice, and the principle that under our system no person, no matter what his station, is above the law. Whether these factors compel a conclusion that as a matter of constitutional interpretation a sitting President cannot be indicted for violations of federal criminal laws is an issue about which, at best, there is presently considerable doubt.

The President rests his textual argument primarily on Article I, Section 3, clause 7, of the Constitution, which provides that "the Party convicted [after impeachment] shall *nevertheless* be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law" (emphasis added). It is argued that the Framers thereby contemplated that criminal indictment must *follow* impeachment by the House and conviction and removal by the Senate. A contemporary student of the subject of impeachment suggests, on the basis of his study of the relevant materials, that the purpose of the "nevertheless" clause was only to preclude the expelled civil officer from avoiding later criminal prosecution by claiming "double jeopardy." Berger, *The President, Congress, and the Courts,* 83 Yale L.J. 1111, 1124 (1974).[12]

---

[12] Berger in this article surveys the historical material relevant to the indictability of an incumbent President and finds that the Framers did not intend to clothe a President with immunity from criminal process. Berger, *supra,* at 1123–1136.

Luther Martin, a delegate to the Constitutional Convention, stated during the impeachment proceedings against Justice Chase that the "nevertheless" clause was designed to eliminate any double jeopardy argument. 14 Annals of Congress 431 (8th

(Continued)

551-892—74——3

Significantly, the clause in question applies to all civil officers who are subject to impeachment, and not solely to the President. Yet, from the earliest days of the Republic, civil officers liable to impeachment have been dealt with in the criminal courts without first being impeached, convicted, and removed. Recently, as this Court is well aware, a panel of the Seventh Circuit composed of three distinguished Senior Circuit Judges specially designated to review the appeal of United States Circuit Judge Otto Kerner rejected the textual argument relied on by counsel for the President and observed that "[t]he purpose of the phrase may be to assure that after impeachment a trial on criminal charges is not foreclosed by the principle of double jeopardy, or it may be to differentiate the provisions of the Constitution from the English practice of impeachment." *United States* v. *Isaacs and Kerner,*

(Continued)

Cong., 2d Sess., 1805). Our research has failed to locate any other statement by a delegate to the Constitutional Convention explicitly stating that the purpose of the "nevertheless" clause was either to avoid the double jeopardy problem or to immunize a President or civil officers from criminal prosecution.

Delegates during the North Carolina debates spoke at length about whether impeachment was the exclusive remedy against miscreant federal officials. 4 Elliot, *The Debates of the Several State Conventions on the Adoption of the Federal Constitution* 32-50 (2d ed. 1836) [hereinafter cited as Elliot's Debates]. At one point Iredell stated that "[h]e [the government official] may be tried in such a court for common-law offenses, whether impeached or not." 4 Elliot's Debates 37. But Governor Johnston was seemingly of the view "that men who were in very high offices could not be come at by the ordinary course of justice; but when called before this high tribunal and convicted, they would be stripped of their dignity, and reduced to the rank of their fellow citizens, and then the courts of common law might proceed against them." *Ibid.*

493 F. 2d 1124, 1142 (7th Cir.), cert. denied, — U.S. — (June 17, 1974). In accordance with the plain thrust of the language of this clause, the court expressly refused to construe it to imply that a sitting federal judge, who is liable to impeachment under the same clause that is applicable to the President, may not be indicted and tried prior to removal from office.[13] In language equally applicable to a federal judge or a President, the court wrote (493 F. 2d at 1144):

> We conclude that whatever immunities or privileges the Constitution confers for the purpose of assuring the independence of the co-equal branches of government they do not exempt the members of those branches "from the operation of the ordinary criminal laws." Criminal conduct is not part of the necessary functions performed by public officials. Punishment for that conduct will not interfere with the legitimate operations of a branch of government. Historically, the impeachment process has proven to be cumbersome and fraught with political overtones.

The panel made no effort to distinguish the President from the sweep and force of this statement.

The President also refers to the views expressed by the Framers as evidencing at least a clear *intent* to immunize the President from criminal prosecution. While there are some statements cited in the

[13] The same clause in the Constitution provides for the impeachment of the "President, the Vice President and all civil Officers of the United States" (Article II, Section 4), and Article I, Section 3, clause 7, relied on so heavily by the President, does not distinguish among the President, Vice President and other civil officers.

President's brief indicating that criminal indictment was expected to follow impeachment, these few statements cannot support the conclusion that the Framers unambiguously intended to immunize an incumbent President from criminal prosecution. They were made by the delegates to the Convention while discussing the issues of executive power, checks on Presidential prerogatives, and the relationship between the impeachment remedy and the President's independence. The precise issue of Presidential immunity was not confronted by those who wrote and debated the Constitution.[14]

The President relies heavily on Gouverneur Morris' opinion articulated at the federal Convention:

> A conclusive reason for making the Senate instead of the Supreme Court the Judge of impeachment, was that the latter was to try the President after the trial of the impeachment. 2 Farrand, *Records of the Federal Convention of 1787* at 550 (1911) [hereinafter cited as Farrand].

All this view contemplates is that a President may commit an act which constitutes *both* an impeachable offense and an indictable crime, and it would be anomalous for the same people who try his impeachment to participate later in the adjudication of his guilt or innocence in a different proceeding but involving the same basic activity. The statement does not imply that Morris considered it mandatory that impeachment precede indictment. Moreover, there was some concern about the possible partiality of judges who had been appointed by the President. Madison, *Debates in the Federal Convention* 536 (1920 ed.). One commentator has suggested that this was the prime reason for having the Senate rather than this Court serve as the tribunal for an impeachment trial. 1 Curtis, *Constitutional History* 482 (1889).

[14] When the Framers were debating what privileges should be accorded the legislators, James Madison suggested that the Convention consider "what privileges ought to be allowed to the Executive." The Convention adjourned at that point, however, and did not return to the topic in its later proceedings. 2 Farrand at 502–03. See also statement of Charles Pinckney in the Senate on March 5, 1800 (Br. 77–78).

We do not claim that any of the actual debates provide any definitive insight into the Framers' intention on the question of the President's amenability to criminal indictment. While counsel for the President states that "there is literally nothing in all of the records of the Convention to suggest that any delegate had any contrary view" (P. Br. 100), the simple fact is that the Framers never confronted the issue at all.

It is significant in this context that unlike congressmen, who were afforded an explicit, limited immunity in the Constitution with respect to their legislative duties, see *Gravel* v. *United States, supra; United States* v. *Brewster,* 408 U.S. 501; *United States* v. *Johnson,* 383 U.S. 169, the President was provided none.[15] And, as we show in our main brief (pp. 67–80),

[15] We do not believe that the failure to provide explicitly for executive immunity was a mere oversight. The debates indicate that much time was spent debating the specifics of the impeachment clause, the powers of the President, and the checks on executive power. A desire to place the Chief Executive above the ordinary processes of law until his term is completed most surely would have been expressly enunciated in the text of the Constitution or at least explicitly recognized during the de-

(Continued)

the separation of powers doctrine does not result in an absolute immunity.

The President offers the additional argument that "[s]ince the President's powers include control over all federal prosecutions, it is hardly reasonable or sensible to consider the President subject to such prosecution" (P. Br. 97).[16] As we have explained in the introduction to our main brief (pp. 27–44), however, the Special Prosecutor, under applicable regulations, has final control over the position the United States, as sovereign, asserts in cases under his defined jurisdiction. Indeed, as we discussed in our main brief (pp. 20–33), the President personally agreed here to

(Continued)

bates. In our main brief, moreover, we have cited the passages showing that the Framers were careful *not* to give the Executive any sweeping privileges or immunity (Br. 76–79).

There is a dearth of scholarly treatment of the question whether an incumbent President can be indicted. One nineteenth century commentator believed that "the ordinary tribunals, as we shall see, are not precluded, either before or after an impeachment, from taking cognizance of the public and official delinquency." Rawle, *A View of the Constitution of the United States of America* 215 (2d ed. 1929). See also 1 Curtis, *Constitutional History* 481 (1889). A contemporary scholar is of the view that an incumbent President can be indicted and he has concluded that "[i]t was because the Founders had learned this lesson from history that presidential powers were enumerated and limited, and that immunity from arrest was altogether withheld." Berger, *The President, Congress and the Courts*, 83 Yale L.J. 1111, 1136 (1974).

[16] The force of the President's argument here could lead to the conclusion that the Attorney General who under 28 U.S.C. 516 and 519 is authorized to conduct and supervise all litigation in which the United States is a party would likewise be immune from federal indictment, as would the United States Attorney for crimes committed in his district. 28 U.S.C. 547. The Constitution could not intend such a result.

the Attorney General's promulgation of regulations (a) giving the Special Prosecutor "full authority for investigating and prosecuting * * * allegations involving the President," (b) specifying that "the Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions," and (c) pledging that "the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor," or to "limit the independence that he is hereby given" or to limit "the jurisdiction of the Special Prosecutor" unless the consensus of eight Legislative leaders approves the President's "proposed action." (See pp. 148, 149, 151–153 of the Appendix to our main brief.) Evidently, therefore, neither the President nor the Attorney General considered prosecution of a President by an independent Special Prosecutor constitutionally inconceivable. It is hardly inevitable, therefore, that future Presidents must be left with personal control over the decision whether they—or their friends and associates—should be prosecuted.

Counsel for the President suggests that the President may have a unique immunity because the "Presidency is the only branch of government that is vested exclusively in one person by the Constitution" (P. Br. 96). Thus, it is argued: "The functioning of the executive branch ultimately depends on the President's personal capacity: legal, mental and physical. If the President cannot function freely, there is a critical gap in the whole constitutional system established by the Framers." (*Ibid.*) This is a weighty argument and it is entitled to great respect. But

whether it is conclusive is uncertain and need not be decided here. It is fair to note, however, that our constitutional system has shown itself to be remarkably resilient. Our country has endured through periods of great crises, including several when our Presidents have been personally disabled for long periods of time. Furthermore, although the executive power is constitutionally vested in the President, it cannot escape notice that, in practical terms, the governmental system that has evolved since 1789 depends for the day-to-day management of the Nation's affairs upon the operation of the several cabinet departments and independent regulatory agencies, without direct Presidential guidance. In addition, the Twenty-fifth Amendment to the Constitution now expressly provides for interim leadership whenever a President is temporarily disabled or incapable of discharging the responsibilities of his office. And it is by no means inevitable, in any event, that the lodging of an indictment against an incumbent President would "cripple an entire branch of the national government and hence the whole system" (P. Br. 97).

Finally, there are very serious implications to the President's position that he has absolute immunity from criminal indictment and to his insistence that under "our system of government only the House of Representatives may determine that evidence of sufficient quantity and quality exists to try the President" (P. Br. 114–15). It is conceded that while the King can do no wrong, a President, in the eyes of the law, is not impeccable. But while there is currently a great debate about whether "impeachable offenses" under

the Constitution include *non-criminal* abuses of official power,[17] it appears that not *every* crime would justify impeachment. As both the House Judiciary Committee staff and the attorneys for the President seem to agree, there must be some nexus between the impeachable misconduct and the office held. As one early commentator explained about the phrase "high Crimes and Misdemeanors":

> They can only have reference to public character and official duty. * * * In general those offences which may be committed equally by a private person as a public officer are not the subjects of impeachment. Murder, burglary, robbery and indeed all offences not immediately connected with office, except the two expressly mentioned [treason and bribery], are left to the ordinary course of judicial proceeding * * *. Rawle, *A View of the Constitution of the United States of America* 215 (2d ed. 1829).

In his submission to the House Judiciary Committee, counsel for the President therefore argued that he is impeachable only for "great crimes against the state." 10 Weekly Compilation of Presidential Documents 271 (March 4, 1974). If counsel for the President is correct that a President is amenable to impeachment only for certain grave public offenses

[17] Compare *Constitutional Grounds for Presidential Impeachment: Report by the Staff of the Impeachment Inquiry*, House Judiciary Committee, 93d Cong., 2d Sess. (Comm. Print February 1974), with *An Analysis of the Constitutional Standard for Presidential Impeachment: Analysis Submitted to the House Committee on the Judiciary by Attorneys for the President*, 10 Weekly Compilation of Presidential Documents 270 (March 4, 1974).

and that he is absolutely immune from criminal prosecution, then indeed the Constitution has left a *lacuna* of potentially serious dimensions.[18]

Because of this purported gap and because of the virtually universal application of statutes of limitations, a President who shared complicity in such "private" crimes as burglary or assault might well be beyond the reach of the law, partaking at least in part of the royal immunities associated with a King. Perhaps this is the design of the Constitution, or a regrettable corollary of it, but we urge caution before such a proposition is accepted as inevitable.

II

THIS DISPUTE BETWEEN THE UNITED STATES, REPRESENTED BY THE SPECIAL PROSECUTOR, AND THE PRESIDENT—TWO DISTINCT PARTIES—PRESENTS A JUSTICIABLE CONTROVERSY

Principles of "separation of powers," frequently quoted in the President's brief, show why on the facts of the present case there are *no* obstacles to the

[18] It is not surprising, therefore, that James Wilson, in the Pennsylvania ratification debates, observed that "far from being above the laws, he [the President] is amenable to them in his private character as a citizen, and in his public character by *impeachment*." 2 Elliot's Debates 480 (emphasis in original). James Iredell, during the North Carolina debates stated:

"If he [the President] commits any misdemeanor in office, he is impeachable, removable from office, and incapacitated to hold any office of honor, trust, or profit. If he commits any crime, he is punishable by the laws of his country, and in capital cases may be deprived of his life." 4 Elliot's Debates 109.

See also *Langford* v. *United States*, 101 U.S. 341, 343, suggesting in dictum that indictment of a President is an alternative to impeachment "if the wrong amounts to a crime."

Court's authority to entertain and decide this controversy. This Court's jurisdiction to consider and resolve this dispute on the merits stems from the fundamental role of the courts in our tri-partite constitutional system—the courts, as the "neutral" branch of government, have been allocated the responsibility to resolve all issues in a controversy properly before them, even though this requires them to determine authoritatively the powers and responsibilities of the other branches (Br. 25–27, 48–52).

This is true even when the dispute presented for resolution implicates intra-branch relationships. Thus, this Court has entertained cases challenging the right of Congress to exclude a duly-elected representative, see *Powell* v. *McCormack*, 395 U.S. 486, and cases brought by an executive officer challenging the propriety of his dismissal by his executive superiors, see, *e.g.*, *Sampson* v. *Murray*, — U.S. — (42 U.S.L.W. 4221, February 19, 1974); *Service* v. *Dulles*, 354 U.S. 363. Indeed, in *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137, Chief Justice Marshall recognized that a federal court could determine whether the Secretary of State improperly withheld Marbury's commission. Contrary to the implications of the argument by counsel for the President (P. Br. 74–76), the case was not dismissed because it involved the "political" powers of the President. Rather, it was dismissed because the statute conferring original jurisdiction on this Court in that case was not consonant with the provisions of Article III narrowly circumscribing the Court's original jurisdiction.

The present controversy arises in the midst of a criminal prosecution pending in the federal courts.

At issue is the enforceability of a subpoena for allegedly privileged evidence. The questions for this Court, then, are whether the judicial process is validly invoked by the Special Prosecutor on behalf of the United States and whether the issue presented for review—the validity of the claim of executive privilege—is justiciable.

A. THE SPECIAL PROSECUTOR HAS INDEPENDENT AUTHORITY TO MAINTAIN THE PROSECUTION IN UNITED STATES V. MITCHELL, ET AL.

There is no need here to review again the history that led to the regulations establishing the Office of the Watergate Special Prosecution Force or the exclusive authority that the Special Prosecutor has to maintain prosecutions within his jurisdiction (Br. 5–6, 9–11, 27–33). What is important to note here, however, is that counsel for the President, by accepting the proposition that the President and Attorney General can delegate certain Executive functions to subordinate officers (P. Br. 10, 41, 106), implicitly has conceded the validity of the regulations, promulgated with the President's consent, delegating specific prosecutorial duties and powers to the Special Prosecutor.[19]

[19] The delegation of specific and limited powers by the President or by cabinet officers is constitutional. See generally *Jay* v. *Boyd*, 351 U.S. 345, 351 n. 8; *Rose* v. *McNamara*, 375 F. 2d 924, 925 n. 2 (D.C. Cir. 1967), cert. denied, 389 U.S. 856; *Sardino* v. *Federal Reserve Bank*, 361 F. 2d 106, 110 (2d Cir. 1966), cert. denied, 385 U.S. 898.

As we establish in our main brief (32–33), the regulations delegating authority to the Special Prosecutor have the force and effect of law.

There can be no question that the Attorney General, with the concurrence of the President, has delegated to the Special Prosecutor "full authority" to prosecute the present criminal case and "full authority" to contest claims of executive privilege made during that prosecution. In exercising this authority, the Special Prosecutor has the "greatest degree of independence that is consistent with the Attorney General's statutory accountability." More specifically, the regulations provide that the "Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions." The only control the Attorney General retains is to dismiss the Special Prosecutor for "extraordinary improprieties." (Br. 146–49.)

Thus, it wholly misses the point for counsel to the President to say that the separation of powers precludes the courts from entertaining this action because "it is the exclusive prerogative of the executive branch, not the Judiciary, to determine whom to prosecute, on what charges, and with what evidence" (P. Br. 39).[20] To the extent this prerogative is exclu-

[20] The implication that this "prerogative" resides ultimately with the President in this case directly contradicts the position of former counsel for the President at oral argument before the court of appeals in *Nixon* v. *Sirica*, *supra*, on September 11, 1973 (p. 15):

"Now, in this instance we have a division of function within the Executive in that my friend, Mr. Cox, has been given absolute independence. It is for him to decide whom he will seek to indict. It is for him to decide to whom he will give immunity—decision[s] that ordinarily would be made at the level of the Attorney General, or in an important enough case at the level of the President."

551-892—74——4

sively Executive, it now lies with the Special Prosecutor with respect to the prosecution of *United States* v. *Mitchell, et al.*, and not with the Attorney General or the President. In a very real sense, therefore, the Office of the Watergate Special Prosecution Force is a quasi-independent agency. It is an agency intended and designed to be "independent of executive authority, *except in its selection,* and free to exercise its judgment without the leave or hindrance of any other official or any department of the government." *Humphrey's Executor* v. *United States,* 295 U.S. 602, 625–26 (emphasis in original).[21]

This case, therefore, is wholly unlike the case of a subordinate executive officer, subject to the direct con-

[21] Indeed, even absent the specific delegation to the Special Prosecutor, the President may not have the same unbridled discretion over the Department of Justice, which enforces the law through the courts and whose officers have duties and responsibilities owed to the courts, as he does, for example, over the State Department or the Department of Defense. Cf. *Myers* v. *United States*, 272 U.S. 52, 135. In *Berger* v. *United States*, *supra*, this court noted (295 U.S. at 88):

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."

It should be emphasized that the Special Prosecutor's independence flows from an arrangement established *by the Executive.* Compare *Humphrey's Executor* v. *United States*, *supra*, 295 U.S. at 629; *Myers* v. *United States*, 272 U.S. 52. Thus, although the Congress was about to enact legislation to provide for an independent Special Prosecutor and has implicitly ratified the current status of the Special Prosecutor's Office under the Department of Justice regulations by special funding, the

trol of his superior, suing that superior. Rather, it is analogous to independent governmental agencies or departments, each pursuing its respective responsibilities, on opposite sides of a case within the courts' jurisdiction. Thus, for example, as this Court noted in its recent decision in *United States* v. *Marine Bancorporation, Inc.,* — U.S. — (June 26, 1974), the Comptroller of the Currency, an officer of the Treasury Department, "intervened in support of the merger as a party defendant" (slip op. at 10) in opposing a suit brought by the Department of Justice in the name of "the United States," challenging a merger the Comptroller had approved under his official powers. The Comptroller was heard in this Court in opposition to the Solicitor General. See also *Secretary of Agriculture* v. *United States,* 350 U.S. 162; *United States* v. *ICC,* 337 U.S. 426. The Special Prosecutor in accordance with his independent responsibilities signed the indictment and initiated the prosecution in the present case. In connection with that prosecution, now properly before the courts, the Special Prosecutor, as attorney for the United States and an officer of the court, is seeking evidence from the President that is relevant and material to the prosecution. The President, acting pursuant to what he views as his responsibilities, has interposed a claim of executive privilege. Fully consistent with the regulations empowering him to contest such a claim, as well as with the expectations of all those who were parties to the establish-

Court is not faced with the "separation of powers" issue that would be presented if the Special Prosecutor derived his authority from a regime designed solely by Congress.

ment of the Office of the Watergate Special Prosecution Force (Br. 29–32), the Special Prosecutor challenged that claim by subpoena, as he is authorized to do without restriction by the President or the Attorney General.

Counsel for the President repeatedly stresses that the President has not delegated to the Special Prosecutor his "duty" to claim executive privilege when he sees fit, suggesting that his retention of that power somehow deprives the courts of jurisdiction (*e.g.*, P. Br. 28–29, 43). We fully agree that the President's power to assert a claim of privilege for presidential papers has not been delegated to the Special Prosecutor. Indeed, it is precisely that power, when it comes into conflict with the independent power of the Special Prosecutor in the context of a pending criminal prosecution to contest the claim of privilege, that creates the live, concrete controversy before the courts.[22]

[22] Even if the Special Prosecutor were to be dismissed, the Office of the Watergate Special Prosecution Force abolished, and the prosecution of *United States* v. *Mitchell, et al.* placed under the control of the Criminal Division of the Department of Justice, such action would not render moot a decision by this Court upholding enforcement of the subpoena or deprive the Court's ruling of finality.

First, several defendants are asserting rights under *Brady* v. *Maryland*, 373 U.S. 83, and its progeny, to obtain access to the subpoenaed material, and they could pursue independently any decision enforcing the subpoena.

Second, although prosecution is generally considered an executive function, even the Attorney General—still assuming hypothetically that the Special Prosecutor is legally ousted from this case—would not have *carte blanche* to dismiss the prosecution here except by leave of court. See Rule 48(a), Federal Rules of Criminal Procedure. And as we pointed out in our main brief, the Attorney General and Solicitor General would be obliged to see to the enforcement of the Court's mandate.

Third, as long as the prosecution remains pending, the district

(Continued)

B. THE ASSERTION OF EXECUTIVE PRIVILEGE AS A GROUND FOR REFUSING TO PRODUCE EVIDENCE IN A CRIMINAL PROSECUTION DOES NOT PRESENT A POLITICAL QUESTION AND THE VALIDITY OF SUCH A CLAIM MUST BE RESOLVED BY THE COURTS

In arguing that the Judiciary, and not the Executive, ultimately must determine the validity of a claim of executive privilege when it is asserted in a judicial proceeding, we rely on the fundamental principle that the courts have the power and the duty to resolve all issues necessary to a lawful resolution of controversies properly before them (Br. 48–52). Although counsel for the President virtually has ignored all the relevant cases, this principle has been applied squarely to cases involving claims of executive privilege. See *Environmental Protection Agency* v. *Mink*, 410 U.S. 73; *Roviaro* v. *United States*, 353 U.S. 53; *United States* v. *Reynolds*, 345 U.S. 1. As those cases demonstrate, the validity *vel non* of a claim of executive privilege presents a justiciable issue. The duty to produce relevant and material evidence for a criminal prosecution, a duty that reaches all citizens, is a duty that "can be judicially identified," and "its breach judicially deter-

(Continued)

court itself, under its established power to summon "court witnesses," could insist on compliance with the subpoena. See, *e.g.*, Rule 614(a), Proposed Federal Rules of Evidence; *United States* v. *Lutwak*, 195 F. 2d 748 (7th Cir. 1952), affirmed, 344 U.S. 604; *Troublefield* v. *United States*, 372 F. 2d 912, 916 n. 8 (D.C. Cir. 1966); *Estrella-Ortega* v. *United States*, 423 F. 2d 509 (9th Cir. 1970). As Justice Frankfurter explained in *Johnson* v. *United States*, 333 U.S. 46, 54 (dissenting opinion): "A trial is not a game of blind man's buff; and the trial judge * * * need not blindfold himself by failing to call an available vital witness simply because the parties, for reasons of trial tactics, choose to withhold his testimony"—"Federal judges are not referees at prize-fights but functionaries of justice."

mined," and the remedy for any breach "can be judicially molded." *Baker* v. *Carr,* 369 U.S. 186, 198.

Counsel for the President nevertheless asserts that this controversy presents a non-justiciable "political question" (P. Br. 44). It was long ago established, however, that the mere fact that a case has "political overtones" (P. Br. 48) does not mean it involves a "political question." See, *e.g., Nixon* v. *Herndon,* 273 U.S. 536. This case involves no "political question" as that concept is correctly understood under the criteria articulated in *Baker* v. *Carr, supra,* 369 U.S. at 217. See also *Powell* v. *McCormack, supra,* 395 U.S. at 518–19.

Perhaps the principal hallmark of a "political question" beyond the power of the federal courts to decide is its commitment by the text of the Constitution to another branch of government for final resolution. Counsel for the President concedes, with considerable understatement, that "[u]nlike its companion privilege attendant upon the Congress by virtue of the Speech and Debate Clause, executive privilege was *not meticulously delineated* by the Framers of our Constitution" (P. Br. 50 n. 34) (emphasis added). Such a privilege is not "delineated" at all in the text of the Constitution and it is still a matter of dispute whether "executive privilege" is a true constitutional privilege at all or simply a common law evidentiary privilege (Br. 57 n. 43). At the very least it is evident that it has been the courts that have fashioned "executive privilege" to promote unfettered and robust debate on matters of policy and they have done so without reliance on any specific clause in the text of the Constitution. Certainly there is nothing in the

text of the Constitution that commits the final determination of the privilege to the Executive. On the contrary, in recognizing this privilege in the context of litigation, the courts from the outset have assumed and asserted that it is for them and not the Executive to determine the validity of a particular claim in the context of the pending case (Br. 54–56).

Moreover, the decisions of this Court, including *Clark* v. *United States,* 289 U.S. 1, as well as *Mink, Reynolds* and *Roviaro,* demonstrate that there are "judicially discoverable and manageable standards" for resolving claims of privilege. And thus, there is no basis for invoking the "political question" doctrine on that ground. Indeed, the common law development of evidentiary privileges generally, even those now embodied explicitly in the Constitution, belies any claim that the courts are not suited for such determinations. While in cases where military secrets or foreign affairs are involved, the courts may not be able to make the delicate judgment whether the national interest requires continued secrecy, the generalized executive privilege for confidential deliberations does not implicate any such sensitive matters properly entrusted to the discretion of the Executive. Compare *Gilligan* v. *Morgan,* 413 U.S. 1, 10–11.

Finally, this Court's decision in *Powell* v. *McCormack, supra,* 395 U.S. at 549, dispels any notion that the courts are precluded by the political question doctrine from overriding a determination by the President:

> Our system of government requires that federal courts on occasion interpret the Constitu-

tion in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.

Nothing about the present litigation over a subpoena for allegedly privileged evidence, issued in a pending criminal prosecution, renders it a "political question" beyond the jurisdiction of the federal courts.

III

THE EXECUTIVE BRANCH DOES NOT HAVE AN ABSOLUTE PRIVILEGE TO WITHHOLD EVIDENCE OF CONFIDENTIAL COMMUNICATIONS FROM A CRIMINAL PROSECUTION

A. THE VALID INTERESTS OF THE EXECUTIVE BRANCH IN PROMOTING CANDID INTRA-AGENCY DELIBERATIONS ARE FULLY PROTECTED BY THE QUALIFIED EXECUTIVE PRIVILEGE REGULARLY RECOGNIZED AND APPLIED BY THE COURTS

We share the desire of counsel for the President to maintain a strong and viable Executive. And we do not deny that wholesale access to evidence of confidential governmental deliberations by every congressional committee and by every private litigant, no matter what the context of the request for information or the need for information, might "chill" the interchange of ideas necessary for the successful administration of the Executive Branch. But this Court is not confronted with the alternatives seemingly posed by counsel for the President: this case does not present a choice between recognizing an absolute privilege on the one hand, or exposing the Executive to repeated unwarranted intrusions on its confidentiality on the other hand. The narrow issue before the Court

is whether the President, in a pending prosecution against his former aides and associates, may withhold material evidence from the court merely on his assertion that the evidence involves confidential communications.

We emphasize at this point that we are not concerned in this case with the "sovereign prerogative" of the Executive "to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense." *New York Times Co.* v *United States,* 403 U.S. 713, 729–30 (Stewart, J., concurring). There has been no claim that any of the subpoenaed conversations involves "state secrets" or that disclosure of any of them will "result in direct, immediate, and irreparable damage to our Nation or its people." 403 U.S. at 730.[23] We deal instead solely with deliberations regarding a domestic crime. Thus, the concerns of Justice Stewart and Justice White do not have "particular force here" (P.Br. 66), and there can be no question that in the context of this case, the qualified executive

[23] In oral argument before the district court on the enforceability of the grand jury's subpoena, counsel representing the President stated that "the President has told me that in one of the tapes that is the subject of the present subpoena there is national security material so highly sensitive that he does not feel free even to hint to me what the nature of it is." Transcript of Hearing on August 22, 1973, at 56, *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon,* 360 F. Supp. 1. (D.D.C. 1973). Nevertheless, when the recordings were submitted to the district court in compliance with later orders of that court and the court of appeals, counsel for the President no longer asserted that any of the subpoenaed conversations included matters relating to the national security and no such information was found.

privilege long recognized and applied by the courts fully protects the Executive's legitimate interests in secrecy.

Neither Presidents nor their aides ever have been assured that their communications will be maintained absolutely confidential, and they certainly cannot confer with that expectation.[24] More often than not, Presidents and their aides voluntarily disclose communications when it serves their purposes. There is no better example than the extensive disclosures by President Nixon with respect to Watergate.

Counsel for the President points to the alleged "crippling effect" of the decision in *Nixon* v. *Sirica*, relying solely on the fact that the President "has received more than two dozen subpoenas emanating from various courts throughout the country, calling for the production of voluminous amounts of privileged materials" (P. Br. 68 n. 51). Significantly, counsel for the President does not tell the Court how many of these subpoenas have been quashed. Nor does

[24] Counsel for the President states that "Presidents have always acted on the assumption that it is discretionary with them, and with them alone, to determine whether the public interest permits production of presidential papers, and the other branches of Government have until recently accepted this position" (P. Br. 55–56). He relies solely on examples, set forth in a table on pp. 55–58 of his brief, where Presidents have refused to submit evidence to *Congress or congressional committees*. Those examples are wholly inapposite to the case at hand. Congressional oversight responsibilities continually place the Congress and Executive in conflict. On many occasions, probing into the mental processes of Executive decision-making results from essentially political considerations. It is in this context, where executive officers are held up to public ridicule, that

he indicate in how many instances courts have ordered compliance with the subpoena.[25]

As counsel for the President himself notes (P. Br. 77–78), however, Chief Justice Marshall held in *United States* v. *Burr*, 25 Fed. Cas. 30, 34 (No. 14,692d) (C.C.D. Va. 1807), that subpoenas may issue to the President and that the "guard, furnished to this high officer, to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued." While counsel for the President apparently rejects the notion that the courts are equipped to protect the Executive Branch against burdensome and oppressive subpoenas, there is no evidence that the courts have failed in this duty. Indeed, the expectation that the courts are incapable of protecting the legitimate interests of the Executive strikes at the very core of the concept of principled adjudication which is reflected in *Reynolds*, *Roviaro* and the lower court cases which hold that executive privilege is not absolute and is subject to determination by the courts (see our main brief at 52–60). The

there is the greatest danger to the policies underlying executive privilege. We emphasize, as we did in our main brief (53–54, n. 38), that determining the validity of a claim of privilege in a pending criminal prosecution in no way requires this Court to determine whether a claim of privilege asserted against Congress presents a justiciable issue. Thus, a decision in this case will not affect the relationship between the President and Congress that until now has depended largely on political factors.

[25] A number of these have been issued at the request of defendants seeking purportedly exculpatory materials in the President's possession. As counsel for the President concedes (P. Br. 29 n. 15): "We do not challenge the jurisdiction of a court to entertain a properly documented request by a defendant for exculpatory materials."

plain fact is that, as far as we are aware, with the exception of a few subpoenas issued to the President at the request of his former aides who are now awaiting criminal trial, all of the other subpoenas to which counsel refers have been quashed by the courts, including several quashed at the Special Prosecutor's urging. Thus, just as with subpoenas to cabinet officers, the courts should be solicitous to avoid *unwarranted* interference with the performance of executive functions, but it is for the courts to decide whether enforcement of process is necessary in each particular case. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 420.

It is true that in the past it has been rare for subpoenas to be issued against the President. This is hardly surprising, because there have been few occasions on which there has been reason to believe that the President has had in his *personal* possession evidence directly material to a criminal prosecution. Counsel for the President cites (P. Br. 80 n. 59) Justice Chase's refusal to issue a subpoena *ad testificandum* to President Adams during the criminal trial of Thomas Cooper for seditious libel against the President, *United States* v. *Cooper,* 25 Fed. Cas. 631, 633 (No. 14,865) (C.C.D. Pa. 1800). But, despite the implication of counsel's assertion, Justice Chase did *not* refuse the subpoena because he viewed the President as immune from process or as having an absolute privilege not to testify. Rather, the court apparently considered it irrelevant and improper on a charge of criminal libel to call the alleged victim to ask him whether he had done the acts he was maliciously accused of. See Cooper, *Account of the Trial of Thomas Cooper of Northumberland* 10 (1800). Indeed, Cooper at first understood that the subpoena had been refused on grounds of privilege, but Justice Chase was categorical in disabusing him of that notion (*ibid.*):

> [Y]ou have totally mistaken the whole business. It is not upon the objection of privilege that we have refused this subpoena: This court will do its duty against any man however elevated his situation may be.—You have mistaken the ground.

It was in that context, when Cooper, who was appearing *pro se,* sought to argue the matter further that Justice Chase interjected: "The Court will not hear you after they have given their decision: It was a very improper and a very indecent request." *Ibid.* That case hardly advances the President's claim here.[26]

---

[26] In fact, William Rawle, who was the United States Attorney for the District of Pennsylvania who personally handled the Cooper prosecution, later wrote in his treatise that the President *is* subject to process, explaining:

"* * * The law makes no distinction of persons, and the maxim that the king can do no wrong, so much admired in England, exists by no analogy in a republican government.

"It may not be improper to consider why such a rule is admitted in monarchies, and why it cannot take place in a well constituted republic. In every monarchy, a quality termed prerogative, is attached to the monarch. * * * But the principle which thus shields and protects the monarch; the sovereignty resident in himself, creates the distinction between him and the elected, though supreme, magistrate of a republic, where the sovereignty resides in the people. All its officers, whether high or low, are but agents, to whom a temporary power is imparted, and on whom no immunity is conferred. An exemption from the power of the law, even in a small particular, except upon

(Continued)

The two most notable instances where subpoenas have been issued to the President include the *Burr* cases and the court martial of Dr. William Barton. As we discussed at length in our main brief, Chief Justice Marshall was unequivocal in upholding the judicial power to issue a subpoena to the President. While there has been dispute over whether President Jefferson complied with the subpoenas, Raoul Berger, after a thorough study of the original reports of the *Burr* trial, has concluded that Jefferson fully intended to comply with the first subpoena, including that part which called for the Wilkinson letter of October 21, 1806. Moreover, after some delay in locating the letter, a copy apparently was submitted to the clerk. See Berger, *The President, Congress, and the Courts,* 83 Yale L.J. 1111, 1115 (1974). As to the second Wilkinson letter, which was in the possession of United States Attorney Hay, the record remains unclear. President Jefferson had claimed privilege with respect to specific portions, asserting that they were irrelevant to the issues at trial. There is no indication whether Chief Justice Marshall ever ruled whether the requirements of Burr's defense to the misdemeanor charge were sufficient to overcome the assertion of privilege. Nor does it appear whether, as the trial developed,

(Continued)
special occasions, would break in upon this important principle, and the freedom of the people, the great and sacred object of republican government, would be put in jeopardy. The exception adverted to, is that already noticed, of members of the legislature * * * but no other officer of government is entitled to the same immunity in any respect."
Rawle, *A View of the Constitution of the United States of America* 168–170 (2d ed. 1829).

Burr's counsel had any occasion to offer the letter into evidence. *Id.*, at 1118–20.

In the Barton court martial, President Monroe was subpoenaed by the defendant.[27] Heeding the advice of his Attorney General that under the *Burr* case such a subpoena may "be properly awarded to the President of the U.S.," [28] President Monroe indicated on the return that although his official duties precluded a personal appearance at the time, he was prepared to testify by deposition.[29] President Monroe subsequently submitted answers to the interrogatories forwarded him by the court martial.[30]

In support of an absolute executive privilege, counsel for the President analogizes to the secrecy of internal court deliberations and refusals by Congress to afford evidence for criminal prosecutions. Certainly, we do not question the views of either the Chief Justice or Justice Brennan, quoted in the President's brief at pp. 59–60, that as a general rule the deliberations of judges, either among themselves or with their law clerks, must be kept secret. But nowhere has there been the suggestion that the secrecy is impenetrable, regardless of the reasons mandating

[27] See Attorney General's Papers: Letters received from the State Department, January 12, 1818, Record Group 60, National Archives.

[28] Letter from Attorney General William Wirt to Secretary of State John Quincy Adams, January 13, 1818, in Attorney General's Opinions, Book A, at 21, Record Group 60, National Archives.

[29] Records of General Courts Martial and Courts of Inquiry of the Navy Department, Record Group 125, National Archives, Microfilm Publication M273, roll 10, frame 0834.

[30] *Id.*, at frames 0790–0806.

in favor of disclosure. For example, consider the *Manton* case, where Circuit Judge Manton was convicted of a conspiracy to obstruct justice and defraud the United States arising out of bribes Manton accepted to influence his decision of cases. See *United States* v. *Manton,* 107 F. 2d 834 (2d Cir. 1939), cert. denied, 309 U.S. 664. We cannot believe that if judicial colleagues of Judge Manton or his law clerk had been in a position to give material testimony on the elements of the crimes charged that they would have been excused because of general notions of confidentiality. Indeed, such a decision would fly in the face of this Court's decision in *Clark* v. *United States, supra.*[31]

Moreover, congressional refusals to supply evidence offer no aid at all to the President's position. On each occasion when Congressmen have refused to testify or when committees have refused to supply documents for use at a trial, there has been an explicit constitutional privilege at issue. These privileges include: (1) the Speech or Debate Clause (Art. I, Sec. 6, cl. 1), which prohibits inquiry "into those things generally said or done in the House or Senate in the performance of official duties and into the motivation for those acts," *United States* v. *Brewster, supra,* 408 U.S. at 512; (2) the Freedom from Arrest Clause (Art. I,

[31] In fact, Circuit Judges Learned Hand, Augustus Hand, and Thomas Swann did testify at the trial (for the defense) about their participation in court conferences with Judge Manton concerning the cases at issue. They stated they had observed nothing unusual about Manton's behavior. Trial Transcript pp. 792–93.

Sec. 6, cl. 1);[32] and (3) Article I, Section 5, clause 3, which empowers each House to maintain Journals which must be published, "excepting such Parts as may *in their Judgment* require Secrecy" (emphasis added).[33]

If there is anything to be learned from the congressional refusals to produce evidence, it is that they are justified from the explicit privileges accorded Congress—privileges that are noticeably absent from Article II. Unlike Congress, the President has no explicit privileges, and if any inference is to be drawn, it is that the Framers intended that he have none. See *Anderson* v. *Dunn,* 6 Wheat. (19 U.S.) 204, 223. Accordingly, examples of congressional refusals to provide evidence in no way imply that the "separation of powers" doctrine would otherwise have justified an absolute congressional privilege and certainly do not support the creation of an absolute executive privilege in the face of the silence of the Constitution on the subject.

[32] Even that clause does not provide absolute immunity from service of process in a criminal proceeding. See *Gravel* v. *United States, supra; United States* v. *Cooper,* 4 Dall. (4 U.S.) 341.

[33] This clause was discussed in the recent decision in *United States* v. *Richardson,* —— U.S. —— (June 25, 1974), where Mr. Justice Douglas observed in his dissenting opinion: "Secrecy has of course some constitutional sanction" (pp. 2–3).

In the Calley court martial, cited by counsel for the President (P. Br. 61 n. 49), Calley attempted to subpoena secret testimony which had been given before a subcommittee of the House Armed Services Committee. When the subcommittee chairman refused to supply the testimony, the military court recognized that this was proper under Article I, Section 5. See 116 Cong. Rec. 37,652 (1970).

551-892—74——5

B. THE FIRST AMENDMENT ERECTS NO ABSOLUTE PRIVILEGE FOR THE PRESIDENT TO WITHHOLD RELEVANT EVIDENCE

For the first time, in this Court, counsel for the President advances the novel argument that the President's rights as an ordinary citizen to privacy and freedom of expression support his claim of an absolute privilege to withhold physical evidence determined to be relevant to the trial of criminal prosecutions.[34]

Viewing this argument as a claim of the President's right as a citizen to free speech, we have an initial difficulty in identifying precisely how the President's freedom of expression would be violated by compliance. There can be no suggestion that enforcement of the subpoena would burden or chill his ability to communicate with the public. This is particularly true

---

[34] While the President's chief reliance is on the First Amendment, he also invokes Article II, Section 2, clause 1 of the Constitution:

"[The President] may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."

Unfortunately, this provision is cited without elaboration or explanation and its relevance to the claim of privilege in this case is not otherwise readily apparent. With the single exception of one meeting on April 17, 1973, at which then-Secretary of State Rogers was present for part of the time, the subpoenaed tape recordings do not relate to meetings between the President and members of his Cabinet concerning their official duties, but rather to conversations between the President and members of his personal staff concerning the Watergate cover-up. To the extent the meeting of April 17 may have included discussions of Secretary Rogers' official responsibilities, not related to Watergate, the possibility of excising such portions can most appropriately be considered when the full tapes are presented to the district judge for his *in camera* examination.

in light of the fact that the White House recording system was established in the first place at government expense by government personnel expressly to create an accurate "historical" record of the President's conduct of his office—to create "a complete, accurate record of conversations held by the President." See Transcript of Hearing on November 6, 1973, at 906, *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon,* D.D.C. Misc. No. 47–73 (testimony of witness Haldeman). As shown by his unilateral action of April 30, 1974, in releasing a great quantity of edited transcripts of Watergate-related conversations, he is free at any time to disclose as much of the recorded material in his possession as he chooses. The thrust of the President's position, however, is to *prevent* any dissemination of the subpoenaed material. Consequently, the interests asserted cannot realistically be those of freedom of expression, but rather solely the converse—the right to refuse to disclose what has been expressed.

But any claim that a constitutional right to privacy bars disclosure here will not withstand analysis. Of course, we do not quarrel with the proposition that the Constitution protects the rights of privacy and freedom of association. These are values at the center not only of the First Amendment, *e.g. Griswold* v. *Connecticut,* 381 U.S. 479, 483; *NAACP* v. *Alabama,* 357 U.S. 449, but also of the Fourth Amendment and the Self-Incrimination Clause of the Fifth Amendment, *Couch* v. *United States,* 409 U.S. 322; *Katz* v. *United States,* 389 U.S. 347; *Hale* v. *Henkel,* 201 U.S. 43; *Boyd* v. *United States,* 116 U.S. 616. The President

at no time has claimed to rely on either the Fourth or Fifth Amendment. The subpoena is narrowly and specifically framed, and the President has not resisted disclosure on the ground that the tape recordings in his possession would tend to incriminate him; on the contrary, the President has consistently maintained his innocence of any wrongdoing. Indeed, the edited transcripts were released publicly on April 30 in an effort to demonstrate "that the President has nothing to hide in this matter." 10 Weekly Compilation of Presidential Documents 452 (May 6, 1974).

Nor does the First Amendment shield the President or any other citizen from "the longstanding principle that 'the public . . . has a right to every man's evidence,' "—that was the precise holding in *Branzburg* v. *Hayes,* 408 U.S. 665, 688, where the Court made perfectly clear that even reliance upon the explicit First Amendment freedom of the press creates no absolute privilege to withhold evidence in criminal prosecutions. In *Branzburg,* which involved a grand jury subpoena for testimony by reporters concerning information received from confidential informants, the claim of the newsmen was virtually identical to that of the President here—that "the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation," 408 U.S. at 693. This Court considered and decisively rejected the claim of privilege in a setting where the reporter was asked to provide information concerning possible criminal activities by his informants. The parallel between that situation and this case is obvious, for the subpoenaed conversations here all involve persons (including the President) charged by the grand jury to have been members of a conspiracy to obstruct justice. Entirely aside from the issue of the President's own alleged complicity,[35] the fact that there is reason to believe that these conversations record or reflect criminal conduct by the other participants is sufficient to override any claim of First Amendment privilege that might otherwise apply. As this Court stated in *Branzburg* (408 U.S. at 692):

> Thus, we cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it. Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question. The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not.

This analysis applies equally to the Executive Office of the President.

The Court also considered the case of a reporter subpoenaed to provide information received from confidential sources about third-party crime. Although it recognized that it was "not irrational" to fear that

---

[35] While dissenting from the majority opinion in *Branzburg,* Justice Douglas agreed that even a reporter would have no First Amendment privilege to refuse to testify if he were himself implicated in a crime (although of course he could invoke the Fifth Amendment). 408 U.S. at 712.

compelling such testimony would burden freedom of the press, 408 U.S. at 693, it held that such a burden is justifiable when the government's purpose is the vindication of the "compelling" and "paramount" public interest in the enforcement of the criminal laws. That test was satisfied as to the reporters' testimony since, on the record,

> it was likely that they could supply information to help the government determine whether illegal conduct had occurred and, if it had, whether there was sufficient evidence to return an indictment. 408 U.S. at 701.

A fortiori, the evidence sought from the President in this case is producible, since the grand jury has already found reason to believe that crimes—involving the President—have been committed, and the tape recordings have been found to be material to the guilt or innocence of defendants already indicted.

First Amendment concepts, therefore, cannot bolster the President's refusal to honor this subpoena for important evidence, whether or not he is regarded as personally implicated in the conspiracy.

IV

THE SUBPOENAED CONVERSATIONS ARE UNPRIVILEGED BECAUSE A PRIMA FACIE SHOWING HAS BEEN MADE THAT THEY OCCURRED IN THE COURSE OF A CRIMINAL CONSPIRACY INVOLVING THE PRESIDENT

We have argued that under cases like *Clark* v. *United States, supra,* the qualified privilege accorded to executive deliberations is inapplicable in this case because of the *prima facie* showing made by the Special Prosecutor below that the subpoenaed conversations were part of a continuing criminal conspiracy involving the President himself (Br. 90–102). Indeed, former counsel for the President conceded in *Nixon* v. *Sirica, supra,* that "[e]xecutive privilege cannot be claimed to shield executive officials from prosecution for crime" (Brief of Petitioner 69). Counsel for the President now responds by challenging the sufficiency of our *prima facie* showing, claiming that the grand jury's naming of the President as an unindicted co-conspirator is proof only of probable cause, which is alleged to be something less than the *prima facie* showing of criminality necessary to overcome the privilege.[36] The President's position, however, not only misconceives the meaning of the grand jury's action, but also ignores the weighty evidentiary presentation, based upon statements supplied by the President himself or by others under oath, which was submitted to the district court.

---

[36] The President also contends that a claim of executive privilege, unlike claims of other privileges concerning confidential communications, cannot be defeated by a showing that the discussions were in furtherance of a conspiracy because the privilege exists for the benefit of the public rather than the individual asserting it. We freely concede, indeed we emphasize, that executive privilege is not a personal or "individual" privilege. But the recognition that the privilege exists to promote the legitimate functioning of government in no way warrants the conclusion that it must stand as a shield in the face of evidence that it has been abused by the officeholder. Indeed, *Clark* v. *United States, supra,* unmentioned by the President's brief, conclusively rebuts any such notion. The "public" rather than "individual" nature of the privilege demonstrates that it cannot be maintained to conceal the criminal activity of a miscreant officeholder. See our main brief at 90–97.

Relying upon cases which hold that there is a distinction between a *prima facie* showing of guilt beyond a reasonable doubt and a determination of "probable cause," the President suggests that the grand jury's decision that the evidence before it warranted the return of an indictment represents only a determination that a crime "might" have been committed (P. Br. 115). This suggestion, however, fundamentally misconstrues the standard applied by a grand jury in determining whether an indictment should issue. A grand jury indictment may not rest on mere suspicion. Thus, as long ago as 1836, Chief Justice Roger B. Taney, sitting as circuit justice in the District of Maryland, instructed a grand jury that it could not indict unless "the evidence before you is sufficient, in the absence of any other proof, to justify the conviction of the party accused." *Charge to Grand Jury,* 30 Fed. Cas. 998, 999 (No. 18, 257) (C.C.D. Md. 1836). This is the settled standard. Sufficient evidence to indict exists "only when there is competent evidence, direct or circumstantial, before you which leads you, as reasonable persons, to believe that the defendant is guilty of the offense charged." Yankwich, *Charge to Grand Jury,* 16 F.R.D. 93, 94 (1955). Indeed, Chief Judge Sirica specifically instructed the grand jury which voted the indictment in *this* case and which alleged that President Nixon was a co-conspirator:

> you ought not to find an indictment unless in your judgment the evidence before you, unexplained and uncontradicted, would warrant a conviction by a petit jury. (Transcript of June 5, 1972).

Thus, the grand jury's naming of the President and others as participants in a conspiracy to obstruct justice constitutes a determination by an independent body, based upon more than eighteen months of evidence, that substantial evidence exists of sufficient strength "to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt," *Coleman* v. *Burnett,* 477 F. 2d 1187, 1202 (D.C. Cir. 1973), and was not an expression of a mere suspicion of possible criminality.

To the extent that the President suggests that the *prima facie* showing which the government must make to overcome the privilege is equivalent to proof of the conspiracy and its participants beyond a reasonable doubt (P. Br. 120), his position is clearly erroneous. The absurdity of requiring the government to prove an individual's guilt beyond a reasonable doubt in order to obtain evidence relevant to a conclusive jury determination of that guilt is obvious. See *United States* v. *Matlock,* —— U.S. —— (42 U.S.L.W. 4252, February 20, 1974); *Lego* v. *Twomey,* 404 U.S. 477, 489. Such a rule would put the government to its proof twice, in an enormous expenditure of time and energy, particularly in a case as complex as the present. Indeed, that very rule has been rejected in the analogous context of the co-conspirator-admissions exception to the hearsay rule. See, *e.g., United States* v. *Geaney,* 417 F. 2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028; *Carbo* v. *United States,* 314 F. 2d 718, 736 (9th Cir. 1963), cert. denied, 377 U.S. 953.

The type of showing which must be made to negate the attorney-client privilege on the ground the relationship was used to further crime is discussed in McCormick, *Evidence,* § 95, at 200 (2d ed. 1972), in terms which are patently relevant here:

> Must the judge, before denying the claim of privilege on [the ground that the communication was made in furtherance of a crime or fraud] find as a fact, after a preliminary hearing if contested, that the consultation was in furtherance of crime or fraud? This would be the normal procedure in passing on a preliminary fact, on which the admissibility of evidence depends, *but here this procedure would facilitate too far the use of the privilege as a cloak for crime.* (Emphasis added.)

Faced with this consideration, McCormick notes that many courts, including this Court in *Clark* v. *United States, supra,*

> have cast the balance in favor of disclosure by requiring only that the one who seeks to avoid the privilege bring forward evidence from which the existence of an unlawful purpose could reasonably be found.

In maintaining that we have made a sufficient showing that the subpoenaed conversations were in furtherance of a continuing criminal conspiracy so as to overcome the presumptive privilege, we have not relied, as the President's brief appears to suggest, solely upon the fact that the grand jury has named all of the principal participants in those conversations as conspirators in a conspiracy to obstruct justice. We do maintain that the grand jury's findings as to the existence of the conspiracy and as to its members are conclusive at this stage of the proceedings, and represent a *prima facie* determination that the conspiracy did exist and that the participants in the subpoenaed conversations were among its members. The credit given to grand jury determinations in such similarly important settings, see *Ewing* v. *Mytinger & Casselberry, Inc.,* 339 U.S. 594, 599; *Ex parte United States,* 287 U.S. 241, 250; *Beavers* v. *Henkel,* 194 U.S. 73, 85; justifies acceptance of its considered judgment as an adequate *prima facie* showing here for rejecting a claim of executive privilege.

In addition to these findings, however, we presented to the court below a detailed factual submission which demonstrated at least *prima facie* that each of the 64 subpoenaed conversations was in furtherance of the conspiracy charged in the indictment. See *Appendix to Memorandum for the United States in Opposition to the Motion to Quash Subpoena Duces Tecum.* The district judge expressly held that these submissions, when viewed in light of the grand jury's findings, "constitute a *prima facie* showing adequate to rebut the presumption [of privilege] in each instance" (Pet. App. 20).

In sum, the indictment, the grand jury's finding concerning the President and the evidence presented to the district judge regarding each specific subpoenaed conversation were clearly sufficient to warrant the conclusion that the claim of executive privilege

must give way and that "the light should be let in." *Clark* v. *United States, supra,* 289 U.S. at 14.

V

THERE IS A COMPELLING PUBLIC INTEREST IN TRYING THE CONSPIRACY CHARGED IN UNITED STATES V. MITCHELL, ET AL. UPON ALL RELEVANT AND MATERIAL EVIDENCE

In our main brief, in addition to showing that the subpoenaed recordings no longer remain presumptively privileged because they were part of a continuing criminal conspiracy (Br. 90–102) and because any privilege has been waived as a matter of law (Br. 116–123), we demonstrated that, in any event, any qualified privilege must yield in the face of the compelling public interest in trying the conspiracy charged in *United States* v. *Mitchell, et al.,* upon all relevant and material evidence.[37] Counsel for the President now

[37] Respondents Ehrlichman and Strachan, defendants in *United States* v. *Mitchell, et al.*, have filed briefs in this Court asserting that they are entitled to the subpoenaed material under *Brady* v. *Maryland, supra,* the Jencks Act, 18 U.S.C. 3500, and Rules 16 and 17(c) of the Federal Rules of Criminal Procedure. The district court withheld ruling on these contentions, stating that defendants' request for access will be more appropriately considered in conjunction with their pre-trial discovery motions (Pet. App. 21–22).

There is no question that the prosecution will make available to defendants any material within its control to which they are entitled under *Brady* or relevant statutes and rules. Beyond that, despite the question raised in the President's mandamus petition, it is clear that the government's obligations under *Brady* extend even to "privileged" evidence. See, *e.g., Roviaro* v. *United States, supra; United States* v. *Andolschek*, 142 F. 2d 503 (2d Cir. 1944). Moreover, *Brady* in all likelihood is applicable to materials within the possession of the President, even though the prosecution has no direct access to them. See *United States* v. *Deutsch*, 475 F. 2d 55, 57 (5th Cir. 1973); *United States* v. *Ehrlichman*, Crim. No. 74–116 (D.D.C. June 14, 1974).

Nevertheless, although *Brady* imposes an affirmative obligation on the government not to suppress exculpatory evidence and to make available to defendants any such evidence of which it is aware, it does not obligate the government to undertake a fishing expedition without any reason to believe exculpatory evidence will be uncovered. See, *e.g., Ross* v. *Texas*, 474 F. 2d 1150, 1153 (5th Cir. 1973), cert. denied, 414 U.S. 850. Here, no defendant has specifically identified any of the subpoenaed material he believes to be exculpatory, and the Special Prosecutor has no reason to believe that the subpoenaed conversations will exculpate any of the defendants.

asserts that we have not shown sufficient need to overcome the privilege.

The simple answer to that contention, however, is that after analyzing our submission below in light of *Nixon* v. *Sirica* and the relevant decisions of this Court, the district court found that the submissions "constitute a *prima facie* showing adequate to rebut the presumption in each instance, and a demonstration of need sufficiently compelling to warrant judicial examination in chambers incident to weighing claims of privilege where the privilege has not been relinquished" (Pet. App. 20).[38] This finding of the district

[38] Counsel for the President asserts that because of executive privilege, "the subpoena should have been quashed in all respects by the court below" (P. Br. 95). So that the record is perfectly clear, we emphasize that the President in his Formal Claim of Privilege expressly stated that he was *not* advancing any "claim of privilege" with respect to the portions of twenty of the subpoenaed conversations for which transcripts have been made public (A. 48a). Nowhere in his brief before this Court does counsel advance any reason why the tapes of those portions of the conversations for which the President himself expressly disclaims privilege can be lawfully withheld.

court, arising from a mixed question of law and fact, is amply supported by the record.

The integrity of the administration of justice demands that all persons—no matter what their station or official status—be answerable to the law. In the context of the indictment in *United States* v. *Mitchell, et al.,* which charges former high government officials with a conspiracy to obstruct justice and defraud the United States, the demands of public justice require a trial based on all relevant and material evidence, particularly where, as here, evidence within the personal possession of the President demonstrably bears on the scope, membership and duration of the conspiracy.

CONCLUSION

For the reasons stated above and in our main brief, the order of the district court should be affirmed in all respects.

Respectfully submitted.

LEON JAWORSKI,
Special Prosecutor.
PHILIP A. LACOVARA,
Counsel to the Special Prosecutor.

Attorneys for the United States.

JULY 1974.

U. S. GOVERNMENT PRINTING OFFICE: 1974

Office-Supreme Court, U. S.
FILED
JUL 1 1974
MICHAEL RODAK, JR., CLERK

Nos. 73-1766 and 73-1834

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES ET AL., RESPONDENTS

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, CROSS-PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRITS OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE RESPONDENT, CROSS-PETITIONER RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES

JAMES D. ST. CLAIR,
MICHAEL A. STERLACCI,
JEROME J. MURPHY,
LOREN A. SMITH,
JAMES R. PROCHNOW,
EUGENE R. SULLIVAN,
JEAN A. STAUDT,
JAMES J. TANSEY,
Attorneys for the President,

Of Counsel
CHARLES ALAN WRIGHT,
LEONARD GARMENT.

The White House, Washington, D.C. 20500,
Telephone Number: 456-1414.

INDEX

	Page
Introduction	1
Argument:	
I. The Special Prosecutor has failed to establish any basis for the jurisdiction of the district court	4
II. A constitutional assertion of a presitial privilege is not reviewable by the court	14
III. The constitutional privilege has not been waived	26
IV. The special nature of the Presidency	31
V. The Special Prosecutor has not demonstrated a unique and compelling need for this material	41
VI. Conclusion	45

TABLE OF CITATIONS

Cases:	
Accardi v. *Shaughnessy*, 347 U.S. 260 (1954)	10
Alderman v. *United States*, 394 U.S. 165 (1969)	29
Andrews v. *Louisville & Nashville R. Co.*, 406 U.S. 320 (1972)	4
Barr v. *Matteo*, 360 U.S. 564 (1959)	39

Cases—Continued

	Page
Bowman Dairy Co. v. *United States*, 341 U.S. 214 (1951)	44
Brady v. *Maryland*, 373 U.S. 83 (1963)	4
Branzburg v. *Hayes*, 408 U.S. 665 (1972)	41
Carr v. *Monroe Manufacturing Company*, 431 F. 2d 384 (5th Cir. 1970)	16
Clark v. *United States*, 289 U.S. 1 (1933)	37
Committee for Nuclear Responsibility v. *Seaborg*, 463 F. 2d 788 (D.C. Cir. 1971)	15, 16, 43
Confiscation Cases, 7 Wall (74 U.S.) 454 (1869)	8
Conway v. *Rimmer*, (1968) 1 All E.R. 874	21, 22, 23
Environmental Protection Agency v. *Mink*, 410 U.S. 73 (1973)	18, 19
Ewing v. *Mytinger & Casselberry*, 339 U.S. 594 (1950)	37
Ex Parte Grossman, 267 U.S. 87 (1925)	2, 4
Ex Parte United States, 287 U.S. 241 (1932)	37
Gravel v. *United States*, 408 U.S. 606 (1972)	38
Gregoire v. *Biddle*, 177 F. 2d 579 (2d Cir. 1949)	39
Kaiser Aluminum & Chemical Corp. v. *United States*, 157 F. Supp. 939 (Ct. Cl. 1958)	16
Marbury v. *Madison*, 1 Cranch (5 U.S.) 137 (1803)	23
Mazer v. *Stein*, 347 U.S. 201 (1954)	4

Cases—Continued

	Page
Mississippi v. *Johnson*, 4 Wall (71 U.S.) 475 (1867)	1, 13, 31
Myers v. *United States*, 272 U.S. 52 (1926)	32
Namet v. *United States*, 373 U.S. 179 (1963)	4
Nixon v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973)	3, 29, 30, 42, 43
Ponzi v. *Fessenden*, 358 U.S. 254 (1922)	8
Roviaro v. *United States*, 353 U.S. 53 (1957)	16
Runkle v. *United States*, 122 U.S. 543 (1886)	8
Sampson v. *Murray*, 414 U.S. 904 (1974)	9
Scheuer v. *Rhodes*, 413 U.S. 919 (1974)	39
Schlesinger v. *Reservists Committee to Stop the War*, — U.S. —, No. 72–1188 (June 25, 1974)	13
Secretary of Agriculture v. *United States*, 350 U.S. 163 (1956)	7
Senate Select Committee on Presidential Campaign Activities v. *Nixon*, No. 74–1258 (D.C. Cir., May 23, 1974)	30
Smith v. *United States*, 375 F. 2d 243 (5th Cir. 1967)	9
Soucie v. *David*, 448 F. 2d 1067 (D.C. Cir. 1971)	17
Spalding v. *Vilas*, 161 U.S. 583 (1896)	38
United States v. *Aldridge*, 484 F. 2d 655 (7th Cir. 1973)	37

Cases—Continued

	Page
United States v. *Bob*, 106 F. 2d 37 (2d Cir. 1939)	37
United States v. *Brewster*, 408 U.S. 501 (1972)	29
United States v. *Calandra*, 414 U.S. 338 (1974)	36
United States v. *Carter*, 15 F.R.D. 367 (D.D.C. 1954)	44
United States v. *Cox*, 342 F. 2d 167 (5th Cir), *cert. denied*, 381 U.S. 935 (1965)	10
United States v. *Ehrlichman, et al.* Cr. No. 74–116 (D.D.C. 1974)	42
United States v. *Interstate Commerce Commission*, 337 U.S. 426 (1949)	7
United States v. *Isaacs*, 493 F. 2d 1124 (7th Cir. 1974)	34
United States v. *Johnson*, 383 U.S. 169 (1966)	38
United States v. *Mitchell*, Cr. No. 74–110 (D.D.C. 1974)	43
United States v. *Reynolds*, 345 U.S. 1 (1953)	14, 15, 16, 18, 23, 29, 30
United States ex rel. *Touhy* v. *Ragen*, 340 U.S. 462 (1951)	19, 20
Wolff v. *McDonnell*, — U.S. —, No. 73–679 (June 26, 1974)	36
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952)	17, 47, 48

Constitution, Statute, Rules, and Regulations:

	Page
Article I	33
Article II	8, 10, 31, 32, 34
Article III	32
18 U.S.C. § 1503; 82 Stat. 1115	42
28 U.S.C. 516; 80 Stat. 613	5
Rule 17(c), Federal Rules of Criminal Procedure	36, 44, 45
Department of Justice; Order No. 551–73 (November 2, 1973), 38 Fed. Reg. 30,738, adding 28 C.F.R. §§ 0.37, 0.38, and Appendix to Subpart G–1	10, 12

Other Authorities:

Berger, R., *Impeachment: The Constitutional Problems* (1973)	34
Bickel A., *New York Times*, June 3, 1974, p. 30	12
Bickel, A., "Wretched Tapes," *New York Times*, August 15, 1973, p. 33	28
Black, C., "Mr. Nixon, the Tapes, and Common Sense," *New York Times*, August 3, 1973, p. 31	25
Carr, et al., *American Democracy in Theory and Practice* (1956)	25
119 *Congressional Record*, E5320, 93rd Cong., 1st Sess (August 1, 1973)	25, 28
118 *Congressional Record*, S. 16,766, 92nd. Cong., 2d Sess. (October 4, 1972)	29

Other Authorities—Continued

	Page
120 *Congressional Record,* 4973, 93rd Cong., 2d Sess. (June 10, 1974)	29
Farrand, *Records of The Federal Convention of 1787* (rev. ed. 1966)	32, 34
The Federalist, No. 69 (A. Hamilton)	33
Letter from President Richard Nixon to Senator Sam Ervin, July 23, 1973	24
2 Op. Att'y. Gen. 482 (1831)	11
Stern & Gressman, *Supreme Court Practice* (4th ed. 1969)	4
Winter, R., *Watergate and The Law* (American Enterprise Institute for Public Policy Research, 1974)	14, 25
8 Wright and Miller, *Federal Practice and Procedure* (1970)	17, 21

INTRODUCTION

The vitally important considerations that must control decision of this case, and that require reversal of the district court, were expressed in the opinion of Chief Justice Chase, for a unanimous Court, in *Mississippi* v. *Johnson,* 4 Wall. (71 U.S.) 475, 500–501 (1867).

> The Congress is the Legislative Department of the government; the President is the Executive Department. Neither can be restrained in its action by the Judicial Department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.
>
> The impropriety of such interference will be clearly seen upon consideration of its possible consequences.
>
> Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the Executive and Legislative Departments of the Government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public wonder of an atempt by

this court to arrest proceedings in that court? These questions answer themselves.

It will not do to say, as the Special Prosecutor does, that "the President is the *head* of the Executive Branch. . . ." (S.P.Br. 79) (emphasis in original).[1] Instead, as the Court said in *Johnson,* "the President is the Executive Department." Or, as Chief Justice Taft, also speaking for a unanimous Court, said in *Ex parte Grossman,* 267 U.S. 87, 120 (1925): "The executive power is vested in a President."

Johnson is important also for its recognition of the utter impropriety of this Court becoming involved in the constitutional process of impeachment. Surely this Court can judicially notice the fact that proceedings are underway in the House Judiciary Committee looking to possible impeachment of the President. The late Thomas Reed Powell is said to have defined the legal mind as a mind that can think of one of two things that are inescapably interrelated without thinking about the other. Only those who would accept this cynical view of the legal process would suppose that this case and the investigation in the Judiciary Committee are wholly unrelated, or that this Court can render a decision in this case without that decision having a heavy impact, one way or the other, in the impeachment process that is so clearly committed exclusively to the House and the Senate.

We shall contend, as we did in our initial brief, that, as it was so powerfully put by Judge Wilkey in his

[1] "Pres. Br." refers to the President's brief filed with this Court on June 21, 1974. "S.P. Br." refers to the Special Prosecutor's brief filed on the same date. "P.S.A." refers to the President's Sealed Appendix. These references are followed by appropriate pagination.

dissent in *Nixon* v. *Sirica*, 487 F. 2d 700, 763–799 (D.C. Cir. 1973), the critical issue is "Who Decides?", and that this Court should affirm the proposition, not seriously challenged for the first 184 years of our constitutional history, that it is for the Chief Executive, not for the judicial branch, to decide when the public interest permits disclosure of Presidential discussions.

> It was and is the President's right to make that decision initially, and it is the American people who will be the judge as to whether the President has made the right decision, i.e., whether it is or is not in the public interest that the papers (tapes) in question be furnished or retained. If his decision is made on visibly sound grounds, the people will approve the action of the Executive as being in the public interest. If the decision is not visibly on sound grounds of national public interest, in political terms the decision may be ruinous for the President, but it is his to make. The grand design has worked; the separate, independent Branch remains in charge of and responsible for its own papers, processes and decisions, not to a second or third Branch, but it remains *responsible* to the American people. (487 F. 2d at 797) (emphasis in original).

The central point at issue here is not whether the President's judgment in this particular instance is right or wrong, but that it is his judgment. In exercising the discretion vested in him, and in him alone, the President may make a mistaken assessment of what best serves the public interest—but courts also on occasion make mistakes. The President in this exercise of discretion may make a decision that is unpopular—but if so he must suffer the political

consequences. The President may even take such action that would constitute a high crime or misdemeanor, but to quote again from Chief Justice Taft in *Ex parte Grossman,* 267 U.S. 87, 121 (1925): "Exceptional cases like this, if to be imagined at all, would suggest a resort to impeachment rather than to a narrow and strained construction of the general powers of the President."

These are the themes we will develop in the balance of this Reply Brief.[2]

I. THE SPECIAL PROSECUTOR HAS FAILED TO ESTABLISH ANY BASIS FOR THE JURISDICTION OF THE DISTRICT COURT

In our initial submission we argued that the courts lack jurisdiction over an internal dispute of a co-equal branch of government (Pres. Br. 27–44) and that such an intra-branch dispute is preeminently a political

[2] Having already submitted a 137-page brief, we regret burdening the Court with so lengthy a reply. We have endeavored so far as possible to avoid repetition, and do not, by failing to renew all of the points made in our initial brief, withdraw any of those. But the case is both important and unique, and because of the briefing schedule ordered by the Court this is the first opportunity we have had to respond to the arguments of the petitioner.

We agree with the statement of the Special Prosecutor (Supplemental Brief, June 21, 1974 at 5) that the application of *Brady* v. *Maryland*, 373 U.S. 83 (1963) to privileged materials not in the prosecutor's possession is not properly before this Court. See Sup. Ct. Rule 23(1)(c); *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320, 324–325 (1972); *Namet* v. *United States*, 373 U.S. 179, 190 (1963); *Mazer* v. *Stein*, 347 U.S. 201, 206 n. 5 (1954); see generally R. Stern & E. Gressman, *Supreme Court Practice* 297–298 (4th ed. 1969).

question and outside the scope of Article III. (Pres. Br. 44–48).

Primarily, the Special Prosecutor appears to allege jurisdiction on two grounds: (1) that this is not an intra-branch dispute, for in all criminal proceedings, the Attorney General does not represent the executive branch but rather the United States as a sovereign entity; and (2) even if the Special Prosecutor is an inseparable part of the executive branch, the delegation of authority and independence given to him by Acting Attorney General Bork is, in itself, sufficient to create jurisdiction in this matter. (S.P. Br. 24–47). As we now show however, both arguments fail to withstand analysis.

In an attempt to negate the intra-executive nature of this dispute, the Special Prosecutor repeatedly asserts that he, as the alter ego of the Attorney General, does not represent the President or the executive branch in a criminal proceeding but rather the United States as a distinct sovereign entity. (S.P. Br. 27–29).[3] Such an argument is without merit for there is no sovereign entity distinct from the three recognized branches of the government. Nor, as a practical matter, is the Attorney General unique in his capacity to act in the name of the United States, for most, if

[3] This argument is premised upon 28 U.S.C. 516 which provides:

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

not all federal actions are performed in the name of "the United States," the ultimate symbol of this nation's sovereignty. To suggest that a governmental action is not a judicial, executive or legislative action, simply because it is taken in the name of the United States, is to confuse the basic symbol of the government with the functional divisions of its authority. The term "United States" does not refer to a separate entity but is a composite description of the three independent and co-equal branches of the government. With their respective roles, each coordinate branch acts in the name of the United States. Thus, it is of no distinguishing consequence that the Attorney General or the Special Prosecutor invokes the name of the United States in conducting a criminal prosecution. Nor does this invocation divest the Attorney General or the Special Prosecutor of their status as subordinate officers within the executive branch of government.[4]

To accept the Special Prosecutor's position that there is, in essence, an independent branch of the government known as the United States, would make meaningless the delegation of authority and balance of power existing between the three branches, and destroy the tripartite form of government established by the Framers. It would create an additional fourth

[4] The Special Prosecutor's assertion that he acts not "in the President's name or at his behest" (S.P. Br. 34) is effectively negated in his own statement of facts where he acknowledges that on October 26, 1973, the President announced that a new Special Prosecutor would be appointed and emphasized that he, the President, had no greater interest than seeing that the Special Prosecutor has the independence he needs to prosecute the guilty and clear the innocent. (S.P. Br. 10)

branch of the government with its own independently derived authority, entitled to its own representation in court and responsible to none of the other branches. Such a proposition is without logical or constitutional merit.

Alternatively, by tracing the statutory authority of the Attorney General, the Special Prosecutor at pp. 27–29, 35–36, 40–42 of his Brief appears to be suggesting to this Court that there may be some legislative basis for his authority akin to a legislative regulatory agency,[5] which would nullify the claim that the present dispute is intra-executive in nature. He summarizes his position as follows: in discharging his responsibilities, "the Special Prosecutor does not act as a mere agent-at-will of the President. He enjoys an independent authority derived from constitutional delegations of authority by the Congress to the Attorney General and from the Attorney General to him . . ." (S.P. Br. 34).

We do not contest the Special Prosecutor's assertion that his authority is derived from the Attorney General, but it is precisely this derivation of authority that conclusively establishes the executive nature of the office he holds. The Attorney General can only delegate to a subordinate officer the same authority and status he himself possesses. Thus, even as the alter

[5] *United States* v. *Interstate Commerce Commission*, 337 U.S. 426 (1949). This case has been fully discussed by us (Pres. Br. 37–38) and that discussion is equally applicable to *Secretary of Agriculture* v. *United States*, 350 U.S. 163 (1956), which also involves a suit by an executive department against the Interstate Commerce Commission.

ego of the Attorney General in a particular matter, the Special Prosecutor is necessarily vested with the same executive status, and no more. To assert that either the Attorney General, an executive cabinet member, or any subordinate officer within the Department of Justice, acts in a legislative or even quasi-legislative capacity when conducting a criminal prosecution is so contrary to the settled law as not to warrant further comment. It remains only to be said that all executive departments exist with some statutory basis, but this does not in anyway alter the exclusively executive nature of their duties and responsibilities. As we pointed out at the beginning, "the President is the Executive Department." The Attorney General is but "the hand of the President." *Ponzi* v. *Fessenden,* 358 U.S. 254, 262 (1922). He is the agent of the President, and any direction given by him is but a direction by the President. *Confiscation Cases,* 7 Wall. (74 U.S.) 454 (1869). Article II, section 3, imposes on the President the duty to "take Care that the Laws be faithfully executed," and though the President ordinarily acts through the Attorney General and his subordinates, they are acting for the President, not for the legislative branch.[6] Con-

[6] In *Runkle* v. *United States*, 122 U.S. 543, 557 (1886), this Court stated:

> There can be no doubt that the President, in the exercise of his executive power under the Constitution, may act through the head of the appropriate executive department. The heads of departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts. That has been many times decided by

(Continued)

sequently, the Special Prosecutor, like the Attorney General, must be considered an executive officer engaged in the exclusive performance of an executive function, namely the prosecution of individuals charged with criminal activities. Thus, neither under the legislative theory nor the sovereign entity theory proposed by the Special Prosecutor has he demonstrated that the present dispute is anything more than an intra-executive dispute beyond the jurisdiction of the district court.[7]

Finally, the Special Prosecutor alleges that the delegation of authority to him by Acting Attorney General Bork, combined with the repeated assurances that he would be free to carry out his responsibilities, confers jurisdiction upon the court to resolve the in-

(Continued)

> this court. *Wilcox* v. *Jackson*, 13 Pet. 498, 513; *United States* v. *Eliason*, 16 Pet. 291, 302; *Confiscation Cases*, 20 Wall. 92, 109; *United States* v. *Farden*, 99 U.S. 10, 19; *Wolsey* v. *Chapman*, 101 U.S. 755, 769.

In addition, the Court of Appeals for the Fifth Circuit in *Smith* v. *United States*, 375 F. 2d 243, 246 (5th Cir. 1967) stated:

> The President of the United States is charged in Article 2, Section 3, of the Constitution with the duty to "take care that the laws be faithfully executed. . ." The Attorney General is the President's surrogate in the prosecution of all offenses against the United States.

[7] The Special Prosecutor erroneously cites this Court's decision in *Sampson* v. *Murray*, 414 U.S. 904 (1974), for the proposition that the district court has jurisdiction to intervene in an intra-branch dispute. That case is however totally inapplicable for it involved a suit by a private citizen against the United States Civil Service Commission alleging that the individual had been erroneously discharged from federal employment.

stant dispute.[8] Such an argument fails for three fundamental reasons. First, the Judiciary has never had jurisdiction to review or determine what evidence the executive branch shall or shall not use in the furtherance of its own case in a criminal proceeding. See, e.g., *United States* v. *Cox*, 342 F. 2d 167 (5th Cir), *cert. denied*, 381 U.S. 935 (1965). The responsibility for making this determination has always been within the executive branch, and includes the power to balance and determine what confidential governmental materials would, if disclosed, be detrimental to the public interest. A decision by the executive branch not to use a particular document, even one which tends to support its own burden of proof in a criminal prosecution, has not been and is not a proper subject for judicial review. (Pres. Br. 39–41).

Second, such a decision is exclusively within the duties and responsibilities delegated by the Constitution to the Chief Executive, for he alone was vested with the obligation to see "that the Laws be faithfully executed." U.S. Const. Article II, section 3. Unless the President has delegated his authority to a subordinate

[8] The Special Prosecutor correctly asserts, at some length, that a federal regulation has the force and effect of law and is therefore binding upon the parties. *Accardi* v. *Shaughnessy*, 347 U.S. 260, 266–267 (1954). However, by raising the question of the jurisdictional basis for the district court's action, Counsel for the President cannot be said to be acting in violation of the Special Prosecutor's rights under 38 Fed. Reg. 30, 738 (1973), nor interfering with the independence granted to the Special Prosecutor to carry out those responsibilities delegated to him, for both parties are under an independent obligation to this Court to discuss the jurisdictional aspects of the present proceeding.

officer, the President's decision in such matters is final, and an improper subject for judicial review.[9]

Third, there has been no delegation of this responsibility by the President to the Attorney General or the Special Prosecutor in the instant case.[10] Nor has the Attorney General attempted to delegate this authority to the Special Prosecutor.[11] This conclusion is fully supported by the brief filed by the Special Prosecutor before this Court, for there is a notable absence of any claim by the Special Prosecutor that he was, in fact, delegated the President's responsibility to weigh the public interest in determining what presidential material shall or shall not be used in this proceeding. Since this responsibility was retained by the President, there can be no basis for a claim that the President acted beyond the scope of his constitutional authority in determining not to use certain presidential material in this case. In so doing, as Professor

[9] There is no merit to either the contention that the President is without authority to direct or control the actions of a subordinate officer or that his control is limited to his ability to discharge an executive employee. (S.P. Br. 35). Even the authority relied upon by the Special Prosecutor, 2 Op. Att'y Gen. 483 (1831) acknowledges the President's right to direct the actions of a subordinate officer.

> Upon the whole, I consider the district attorney as under the control and direction of the President, in the institution and prosecution of suits in the name and on behalf of the United States; and that it is within the legitimate power of the President to direct him to institute or to discontinue a pending suit, and to point out to him his duty, whenever the interest of the United States is directly or indirectly concerned. 2 Op. Att'y Gen. 487 (1831).

[10] See Pres. Br. 29 n. 14.

[11] See Pres. Br. 43 n. 31.

Bickel pointed out, he is simply "exercising the lawful powers of his office, which he may do until removed upon impeachment and conviction." *New York Times,* June 3, 1974, p. 30. Because this decision is clearly within the prosecutorial discretion vested in the executive branch, and in particular in the Chief Executive, the district court is without jurisdiction to review this determination.

The district court's lack of jurisdiction was not altered, as the Special Prosecutor suggests, merely because he may "determine whether or not to contest the assertions of executive privilege or any other testimonial privilege." 38 Fed. Reg. 30, 738 (1973). In this suit, the Special Prosecutor is merely asking this Court to determine whether the Chief Executive was correct in determining that certain executive materials should not, in the public interest, be used to further this prosecution. However, neither the President, the Attorney General, or the Special Prosecutor, by agreement or otherwise, can foist upon the courts the executive branch's own responsibility for determining the advisability of using certain executive materials in the furtherance of its own case. Nor, through judicial review, can the executive branch compel the court to resolve or determine the wisdom of a discretionary decision made by the Chief Executive when it is within the bounds of his constitutional authority. Therefore, not even through the mechanism of a lesser official like the Special Prosecutor, can the executive or the legislative branch confer jurisdiction upon the courts to

review any discretionary determinations, solely within their respective spheres. In this regard, even the Special Prosecutor is forced to concede that neither "the President nor the Department of Justice could confer jurisdiction on the courts when such jurisdiction is constitutionally impermissible." (S.P. Br. 42). In all circumstances it is constitutionally impermissible for a district court to review a decision by the executive branch, especially the Chief Executive, that it will not use a particular document even to the benefit of its own case. Accordingly, the Special Prosecutor has failed to establish any basis for the district court's jurisdiction to intervene in this intra-branch dispute for the purpose of reviewing a prosecutorial decision made by the Chief Executive in the course of a criminal proceeding."

---

[12] We find no necessity to repeat our position as to the power of the Court to entertain and determine a political question. (Pres. Br. 44–48). However, there is one point that must be emphasized. Since *Mississippi* v. *Johnson*, 4 Wall. (71 U.S.) 475 (1867), this Court has correctly been reluctant to intervene in political questions involving discretionary decisions that are properly the sole prerogative of a coordinate branch of government. No dispute could more clearly entangle this Court in a "political question" than the present dispute, which unquestionably affects the ongoing impeachment inquiry, and thus would be an intrusion by the Judiciary on the Legislature as well as the Executive. Only last week the Court refused to "distort the role of the Judiciary in its relationship to the Executive and the Legislature. . . ." *Schlesinger* v. *Reservists Committee to Stop the War*, — U.S. —, No. 72-1188, Slip Op. p. 19 (June 25, 1974).

II. A CONSTITUTIONAL ASSERTION OF A PRESIDENTIAL PRIVILEGE IS NOT REVIEWABLE BY THIS COURT

We deem it important to emphasize three points: (1) The issue at stake is presidential privilege, founded in the Constitution, relating to conversations of the President with his closest advisers, not the concept of executive privilege as it may be generally applicable to persons in the executive branch and under other circumstances; (2) The resolution of this issue lies in an analysis of the design of our government as a whole and its development, including but not limited to that of judicial precedents[13] (Pres. Br. 54–68); and (3) We repeat: "Significantly, the precise issue of the 'absoluteness' of executive privilege, as applied to presidential communications, has never been squarely confronted and definitely resolved by this Court." (Pres. Br. 51). To the extent there exists relevant judicial precedent, it supports the President's position. (Pres. Br. 74–82).

Because of the nature of the privilege asserted by the President, the bald statement of the Special Prosecutor that ". . . this Court has squarely rejected the claim that the Executive has absolute, unreviewable discretion to withhold documents from the courts" (S.P. Br. 18) is unsound. The mainstay of the Special Prosecutor's position, *United States* v. *Reynolds,* 345 U.S. 1 (1953), sustained, without the necessity of judicial inspection, a claim of privilege made on national

[13] See Winter, *Watergate and The Law* 54–55 (American Enterprise Institute for Public Policy Research 1974)

security grounds by the Secretary of the Air Force.[14] Regardless of what principles may be extracted from that case, one thing is clear: the Court did not decide any constitutional issues. In summarizing *Reynolds,* (S.P. Br. 54), the Special Prosecutor omitted the language of Chief Justice Vinson, which reveals the true nature of the case:

> Both positions have constitutional overtones which we find it unnecessary to pass upon, there being a narrower ground for decision. . . .
> . . . Since Rule 34 compels production only of matters 'not privileged,' the essential question is whether there was a valid claim of privilege under the Rule. . . . We think it should be clear that the term 'not privileged' as used in Rule 34, refers to 'privileges' as that term is understood in the law of evidence. (345 U.S. at 6).

With the exception of *Committee for Nuclear Responsibility, Inc.* v. *Seaborg,*[15] 463 F. 2d 788 (D.C. Cir. 1971), the other cases relied upon by the Special Prosecutor are for the same reason not relevant to this Court's disposition of the present dispute.

[14] It should also be noted that the Court felt the necessity for the evidence sought was dubious. 345 U.S. at 11. In circumstances strikingly similar to those of the present case, it was noted that the Government had offered to make available, for testimony, the flight crew whose written statements were a prime object of the plaintiffs' discovery motions.

[15] In *Seaborg*, the court stated that in *United States* v. *Reynolds*, *supra*, the issue of executive privilege based, on the constitutional doctrine of separation of powers, had been noted, but not decided. 463 F. 2d at 793.

Roviaro v. *United States*, 353 U.S. 53 (1957), turned on the nature of the "informer's privilege," a government privilege arising out of an interest in effective law enforcement. *Carr* v. *Monroe Manufacturing Company*, 431 F. 2d 384 (5th Cir. 1970), a racial discrimination case against private and state defendants, dealt with an absolute privilege claim based on a state statute.[16] *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939 (Ct. Cl. 1958), a breach of contract case, involved a claim of executive privilege by the Administrator of the General Services Administration. In language echoing that of this Court in *Reynolds*, the court defined the privilege claimed solely in terms of the law of evidence, with its foundation in custom or statute.[17] The *Seaborg* case involved an attempt by environmentalists to enjoin the explosion of a nuclear underground test by the Atomic Energy Commission. In response to discovery efforts to ascertain whether the requirements of the National Environmental Policy Act had been met, the government, through five agency heads, asserted a claim of executive privilege based on constitutional grounds. That claim was summarily rejected by the court of appeals without reference to any judicial precedent or historical analysis.[18] That fact, coupled with the realization that presidential communications

[16] The court utilized *Reynolds*, as an analogy, to buttress its decision against absolute privilege. 431 F. 2d at 388.

[17] In *Kaiser*, the court held, without judicial review of the documents requested, that no production was required.

[18] 463 F. 2d at 793. Three of the judges of the United States Court of Appeals for the District of Columbia Circuit who were part of the majority in *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973) comprised the unanimous Court in *Seaborg*.

were not involved, deprives the holding of that case from exerting any meaningful influence on the precisely-drawn issue which is before this Court.

Our position, contrary to that apparently assumed by the Special Prosecutor (S.P. Br. 49–50), is not at odds with this Court's decision in *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). The touchstone of that holding was that President Truman's action in directing the seizure of the steel mills was not supported by any statutory or constitutional provision or concept; it exceeded all express and inherent power of the Presidency. In contrast, President Nixon's action, i.e., his assertion of executive privilege, is based squarely on the Constitution.[19] All the foregoing cases are examples where the Judiciary has reviewed, in varying degrees, claims of privilege exerted by lesser officers in the executive branch of govern-

[19] See *Soucie* v. *David*, 448 F. 2d 1067, 1071 n. 9 (D.C. Cir. 1971); (Pres. Br. 49–50). We call the Court's attention to S.P. Br. 57 n. 43, where the Special Prosecutor notes Professor Wright's summary of commentators' skeptical attitude toward the belief that executive privilege is rooted in the Constitution. This Court should be aware of the actual setting of that observation. Professor Wright, in the text, was discussing governmental privileges covered by the proposed Rules of Evidence. He observed: "There [in the proposed rules] is no mention of the general executive privilege and it is to be abolished except to whatever extent it may be *required by the Constitution*. 8 Wright & Miller, *Federal Practice and Procedure: Civil* § 2019 at 175 (1970) (emphasis added). The footnote that elaborates that textural statement and that encompasses the language cited by the Special Prosecutor has the following remark as its initial thrust:

> The Supreme Court has said that the claim of an executive privilege has "constitutional overtones." *U.S.* v. *Reynolds*, 1953, 73 S. Ct. 528, 531, 345 U.S. 1, 6, * * *

ment. Although, as we have shown, they are readily distinguishable from the case at bar, we recognize that a court will necessarily be confronted with similar issues and must review and determine them. In fulfilling its duty to resolve all the issues before it, a court, at times, must exercise its authority in a manner consistent with competing interests, e.g. a claim of privilege against self-incrimination.[20] However, in this case the court's duty and authority of review is complete when it determines that the President of the United States has asserted privilege.

Environmental Protection Agency v. *Mink,* 410 U.S. 73 (1973), deserves comment because of the Special Prosecutor's allusion to it. There the controversy centered around the government's asserted right of nondisclosure of certain documents under a provision of the Freedom of Information Act, a statute exempting from disclosure non-factual intra-agency advisory material. This Court fashioned a method of examination whereby the trial court could separate factual data from exempt material.[21] In remanding the case, in part thereby reversing the decision of the court of appeals for the plaintiffs, this Court held that "in camera inspection" was not automatic since the agency may be able to show, by affidavit, that the items sought are,

[20] See discussion in *United States* v. *Reynolds*, 345 U.S. 1, 8–9 (1953).

[21] It also held that certain documents could not be subjected to any "in camera" inspection. 410 U.S. at 81–85. As to documents concerned with national defense, Justices Marshall and Brennan felt the need for secrecy was a decision solely for the Executive. 410 U.S. at 99–100.

in fact, exempt. 410 U.S. at 93. The Special Prosecutor has attempted to utilize this case for the proposition that "the constitutional separation of powers does not give the Executive any constitutional immunity from judicial orders for the production of evidence." (S.P. Br. 61). In this regard, Justice Stewart at the outset of his concurring opinion noted that no constitutional claim was involved, and there was no issue regarding the nature or scope of executive privilege. 410 U.S. at 94. The second point to be noted in the *Mink* case is that no one was compelled to do anything. The Court did not discuss what might legally occur if the claim of privilege was ultimately rejected and noted the difficulty in analogizing Freedom of Information Act cases to ordinary litigation because of the non-availability of the option to dismiss or strike a defense which exists in the latter.

Lastly, *United States* ex rel. *Touhy* v. *Ragen*, 340 U.S. 462 (1951), has been cited in support of the Special Prosecutor's contention that the Judiciary has the power to compel production of evidence from the executive. (S.P. Br. 63). This case, once again, involved a decision in which the production of documents was not ordered. This Court upheld the validity of a Department of Justice regulation, which constituted the basis for the FBI agent's refusal to comply with a subpoena *duces tecum*. In the holding, this Court specifically stated:

> Petitioner challenges the validity of the issue of the order under a legal doctrine which makes the head of a department rather than a court

> the determinator of the admissibility of evidence. In support of his argument that the Executive should not invade the Judicial sphere, petitioner cites Wigmore, Evidence (3 ed.), § 2379, and *Marbury* v. *Madison,* 1 Cranch 137. ***But under this record we are concerned only with the validity of Order No. 3229.*** The constitutionality of the Attorney General's exercise of a determinative power as to whether or on what conditions or subject to what disadvantages to the Government he may refuse to produce government papers under his charge must await a factual situation that requires a ruling. (340 U.S. at 468–469[22]) (emphasis added).

Immediately following his reference to *Ragen,* the Special Prosecutor quotes (S.P. Br. 63) certain language from a work of Professor Wright in an attempt to emphasize his contention concerning the judicial power of enforcement in this case. The entire text of the partially quoted statement of Professor Wright now follows:

> In private litigation refusal of a government officer to comply with a court order overruling a claim of executive privilege and ordering disclosure could lead to conviction of contempt," but there is a natural reluctance to invoke this sanction and the extraordinary writs of mandamus and prohibition have been held available to review contempt citations. If the government is a party, the court may penalize it for its failure to comply

[22] The Special Prosecutor's recitation of Professor Wright's language ends here.

> with a disclosure order by invoking any of the sanctions set forth in Rule 37(b)(2). In this way the court can achieve fairness in the case before it without actually compelling production of the information that the government is determined to keep confidential. 8 Wright and Miller, *Federal Practice and Procedure: Civil,* § 2019, at 172–173 (1970).

When holdings, as opposed to random language, command our attention, it becomes evident that such judicial precedent as does exist in fact supports the President's concept of executive privilege rather than that urged by the Special Prosecutor.

The Special Prosecutor cites *Conway* v. *Rimmer,* [1968] 1 All E.R. 874, in support of his argument that the Executive cannot be given unreviewable discretion in these matters. (S.P. Br. 56 n. 41). *Conway,* far from supporting the Special Prosecutor's view, is in fact wholly consistent with the position we are advancing. It is true that in *Conway* the House of Lords overruled what had been the English rule that a claim of privilege, no matter how routine or unimportant the document, is binding on the courts. Their Lordships, however, were at great pains to distinguish the kind of low-level routine papers there involved from papers at the highest level of government. Every one of the speeches drew this distinction and made it clear that when high-level documents, of the sort we have in the present case, are sought, the court must accept the Executive's claim of privilege without further inquiry. Thus in the principal speech Lord Reid said that "there are certain classes of documents which ought

not to be disclosed whatever their content may be." He then referred to "cabinet minutes and the like" as an example of a class of documents that ought not to be disclosed until they "are only of historical interest." [1968] 1 All E.R. at 888. Lord Hodson instanced "cabinet minutes, despatches from ambassadors abroad and minutes of discussions between heads of departments" as among those that are absolutely protected by a claim of Crown privilege. [1968] 1 All E.R. at 902, and see also his remark at 905. Lord Pearce said:

> Obviously, production would never be ordered of fairly wide classes of documents at a high level. To take an extreme case, production would never be ordered of cabinet correspondence, letters or reports on appointments to offices of importance and the like; but why should the same yardstick apply to trivial documents and correspondence with or within a ministry. [1968] 1 All E.R. at 910.

The observation of Lord Upjohn was in a similar vein:

> No doubt there are many cases in which documents by their very nature fall into a class which requires protection such as, only by way of example, cabinet papers, foreign office despatches, the security of the State, high-level inter-departmental minutes and correspondence, and documents pertaining to the general administration of the naval, military and air force services. . . . So, too, high-level inter-departmental communications, to take, only as an example on establishment matters, the promotion or transfer of reasonably high-level personnel in the service of the Crown; but no catalogue can reasonably be compiled. The reason for this privilege is that it would be quite wrong and entirely inimical to the proper functioning of the public service if the public were to learn of these high-level communications, however innocent of prejudice to the State the actual contents of any particular document might be; that is obvious. [1968] 1 All E.R. at 914–915.

Only Lord Morris of Borth-Y-Gest did not attempt to specify particular kinds of documents that are absolutely privileged, but he too noted that "[i]n many cases it will be plain that documents are within a class of documents which by their very nature ought not to be disclosed." [1968] 1 All E.R. at 901.

This recognition that there are some kinds of documents on which the decision of the Executive must be final, and not subject to review by the courts, is wholly consistent with what was held in *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953), and indeed the *Reynolds* opinion was quoted in the principal speech in *Conway* of Lord Reid. [1968] 1 All E.R. at 887. It is consistent also with this Court's disclaimer in *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137, 170 (1803) of any judicial power to order "an intrusion into the secrets of the cabinet. . . ."

The distinction insisted upon so vigorously by all of the judges in *Conway* is the distinction that should control here. Decisions concerning material in the lower echelons of government or material of a routine,

everyday nature, are not in point. The subpoena here in issue calls for recordings and notes of conversations between the President of the United States and his closest advisers.

We referred in our initial brief to "[t]he velocity with which the confidentiality of presidential communications has eroded. . . ." (Pres. Br. 133). Demands for presidential recordings or papers or even for presidential testimony have come from judges and defendants all over the country, both state and federal." In his letter of July 23, 1973, to Senator Ervin, the President observed that "the tapes could be accurately understood only by reference to an enormous number of other documents and tapes, so that to open them at all would begin an endless process of disclosure and explanation of private Presidential records. . . ." The accuracy of that observation is now a matter of common knowledge. Initially Special Prosecutor Cox subpoenaed tapes and notes of nine conversations. His successor has been furnished all existing material covering those conversations and the President has voluntarily given Special Prosecutor Jaworski tapes of many other conversations. Now the Special Prosecutor seeks to require production of 64 more conversations. Should he be successful in that attempt, only a very foolhardy person would dare to predict that this would be the end of the matter and that the demand for private presidential material would not continue to grow insatiably.

[23] See Pres. Br. 68 n. 51.

All that we have said on this point was succinctly put by a distinguished constitutional lawyer, Charles L. Black, Jr., who has observed that refusal to disclose communications of the kind involved in this litigation is not only the President's lawful privilege

> but his duty as well, for it is a measure necessary to the protection of the proper conduct of his office, not only by him but, much more importantly, by his successors for all time to come.
>
> * * * * *
>
> It is hard for me to see how any person of common sense could think that those consultative and decisional processes that are the essence of the Presidency could be carried on to any good effect, if every participant spoke or wrote in continual awareness that at any moment any Congressional committee, or any prosecutor working with a grand jury, could at will command the production of the verbatim record of every word written or spoken. Black, "Mr. Nixon, the Tapes, and Common Sense" *New York Times,* August 3, 1973, page 31.[24]

Although the Presidency will survive if the lower court's decision is allowed to stand, it will be different from the office contemplated by the Framers and occupied by Presidents, from George Washington through today.

[24] See the fuller expression of Professor Black's view in Cong. Rec. E5320–E5322 (daily ed. August 1, 1973); see also Carr, Bernstein, Morrison, Snyder, & McLean, *American Democracy in Theory and Practice* 609–610 (1956); Winter, *Watergate and The Law* 55 (American Enterprise Institute for Public Policy Research 1974).

III. THE CONSTITUTIONAL PRIVILEGE HAS NOT BEEN WAIVED

The Special Prosecutor purports to offer the Court an easy solution to the hard problems of this case when he says:

> the Court must use its process to acquire all relevant evidence to lay before the jury. In the present context it can do so with the least consequences for confidentiality of other matters and future deliberations of the Executive Branch by ruling that there has been a waiver with respect to this entire affair. (S.P. Br. 123).

The Court is offered three theories on which the Special Prosecutor thinks a holding of waiver can be justified. These are the President's statement of May 22, 1973, authorizing his aides to testify about Watergate-related matters (S.P. Br. 119), the President's release to the public of transcripts from 43 Watergate-related Presidential conversations (S.P. Br. 119),[25] and the fact that H. R. Haldeman has been permitted to hear tapes of selected conversations (S.P. Br. 122). Neither singly nor together do any of these waive the President's privilege not to disclose other conversations that are still confidential.

It is of course a truism that ordinary evidentiary privileges can be waived, as the cases discussed by the

[25] The President stated in his Formal Claim of Privilege (J.A. 48a) that he advanced no claim of privilege with respect to those portions of 20 tape recorded conversations for which transcripts have been made public. Accordingly, those portions of the 20 tapes are not at issue in this case as the President has no objection to judicial authentication.

Special Prosecutor indicate. (S.P. Br. 117–121). But the separation-of-powers notions that underlie what is commonly referred to as "executive privilege" are such that ordinary common law notions of waiver are wholly inapplicable here. The privilege refers to the power of the President to decide whether or not the public interest permits disclosure of particular information. Because the President determines that the public interest permits making public certain information or because he determines that it is in the public interest to disclose other information to those persons in and out of government in whom he has confidence and from whom he seeks advice, he is not thereby precluded from determining that still other information must, in the public interest, be kept in confidence. The matter was well put by Professor Alexander Bickel:

> Again, the issue is not whether the President has waived his privilege to keep the tapes secret. To the extent that it exists and with respect to matter that it covers, I do not see how the privilege can be waived. Naturally, if a document or a tape is no longer confidential because it has been made public, it would be nonsense to claim that it is privileged, and nobody would trouble to subpoena it either, since it would be available.
>
> But nature and reason of the privilege are rather to repose in the President and in him alone the subjective judgment whether to maintain privacy or release information—and which, and how much, and when, and to whom. Far from being waived, the privilege, it seems to me,

is as much exercised when information is released as when it is withheld. Bickel, "Wretched Tapes (cont.)," *New York Times,* August 15, 1973, p. 33.

A consitutionally-based privilege, which exists only so that the President, like the courts and like Congress, can function effectively hardly vanishes because, in Professor Black's phrase, "little mousetraps of 'waiver' are sprung." Letter of Prof. Charles L. Black, Jr., Cong. Rec. E5320, E5323 (daily ed. August 1, 1973).

Nor is there any merit in the argument that by allowing his aides to testify on Watergate matters, the President waived privilege as to tape recordings. There is an inherent distinction between testimonial evidence and tape recorded conversations. This distinction is emphasized and evidenced by the very existence of the present dispute. It should be obvious—and the published transcripts that have been released vividly confirm—that recordings are the raw material of life. By their very nature they contain spontaneous, informal, tentative, and frequently pungent comments on a variety of subjects inextricably intertwined into one conversation. It is precisely with that distinction in mind, and with a strong desire that the truth about Watergate be brought out, that the President has not aserted a presidential privilege with regard to *testimony* about possible criminal conduct or discussions of possible criminal conduct. But testimony can be confined to the relevant portions of the conversations and can be limited to matters that do not endanger other privileged matters. Recordings

cannot be so confined and limited, *Alderman* v. *United States,* 394 U.S. 165, 182 (1969), and thus the President has concluded that to produce recordings would do serious damage to presidential privacy and to the ability of that office to function effectively.

The distinction between testimonial evidence and other forms of tangible evidence is not only recognized by the executive branch, as there is a common congresssional practice in waiving congressional privilege and authorizing oral testimony by congressional staff members in court, but refusing to permit submission of related tangible material. See *Nixon* v. *Sirica,* 487 F. 2d 700, 772 (D.C. Cir. 1973) (Wilkey, J., dissenting), citing *United States* v. *Brewster,* 408 U.S. 501 (1972), and 118 Cong. Rec. S. 16,766, 92nd Cong. 2d Sess. (October 4, 1972) See also S. Res. 338, 120 Cong. Rec. 4973, 93rd Cong., 2d Sess. (daily ed., June 12, 1974).

The distinction has been recognized also in this Court. Indeed the short answer to the Special Prosecutor's claim of waiver with regard to the materials now sought may be found in *United States* v. *Reynolds,* 345 U.S. 1 (1953). In that case the United States refused to produce an Air Force investigation report of an airplane crash as well as written statements by the survivors of the crash. It offered to allow the survivors to give depositions and to testify as to all matters except those of a "classified nature." The Supreme Court sustained the claim of privilege with regard to the documents sought. The offer to allow the witnesses to testify, far from being a waiver of privilege as to the documents, was expressly relied on by the Supreme Court as a reason for upholding the claim of privilege.

345 U.S. at 11. Similarly, the court of appeals in *Senate Select Committee on Presidential Campaign Activities* v. *Nixon,* No. 74–1258 (D.C. Cir., May 23, 1974), regarded an identical waiver argument, offered by the plaintiffs in that case, as so lacking in substance that it did not merit discussion in the opinion.

Finally, there is much weight in a point made by Judge MacKinnon in his dissent in *Nixon* v. *Sirica,* 487 F. 2d 700, 758–759 (D.C. Cir. 1973). He wrote:

> There has been no waiver. This conclusion rests upon three factors: the strict standards applied to privileges of this nature to determine waiver; the distinction between oral testimony and tape recordings; and, most important, considerations of public policy that argue persuasively for a privilege that permits the Chief Executive to disclose information on topics of national concern without that which properly ought to be withheld in the public interest.

Like Judge MacKinnon, we think that the most important of these points is the one last stated. Plainly the country is best served when there is the maximum disclosure possible from the Executive, consistent with the requirements of the public interest. This President, like his predecessors, has always acted on that principle. Disclosure has been the rule and claim of privilege the rare exception. But if this Court were to accept the Special Prosecutor's beguiling suggestion that this case can be decided on a narrow ground of waiver, the inevitable long-term consequence must be less disclosure, not more, since Presidents will be reluctant to make public even those things that can be

released without harm to the public interest, if by doing so they may be held to have waived their constitutional privilege to withhold related information that the nation's interests require be kept confidential.

IV. THE SPECIAL NATURE OF THE PRESIDENCY

The Special Prosecutor states an obvious and important truth when he reminds us that "in our system *even the President* is under the law." (S.P. Br. 68) (emphasis in original). A fundamental error that permeates his brief, however, is his failure to recognize the extraordinary nature of the Presidency in our system and that the Framers, who fully understood this, provided an extraordinary mechanism for making a President subject to the law.

The President is not merely an individual, to be treated in the same way as any other person who has information that may be relevant in a criminal prosecution. He is not, as the Special Prosecutor erroneously suggests, merely "the *head* of the Executive Branch." (S.P. Br. 79) (emphasis in original). Instead, as we pointed out at the beginning of this brief, it was announced by this Court more than a century ago, and since reiterated, that "the President is the Executive Department." *Mississippi* v. *Johnson,* 4 Wall. (71 U.S.) 475, 500 (1867). So much is apparent from the Constitution itself. Article II begins with the simple but sweeping declaration: "The executive Power shall be vested in *a* President of the United Statese of America" (emphasis added). In addition, the President, as this Court has recognized, is, more than any other officer of government the represent-

ative of all of the people. *Myers* v. *United States,* 272 U.S. 52, 123 (1926). Chief Justice Taft went on to say that

> as the President is elected for four years, with the mandate of the people to exercise his executive power under the Constitution, there would seem to be no reason for construing that instrument in such a way as to limit and hamper that power beyond the limitations of it, expressed or fairly implied.

It was no mere happenstance that all executive power was vested in a single person, the President. This was a subject of recurring debate at the Constitutional Convention. Suggestions of a multi-member Executive were repeatedly pressed and as repeatedly rejected. It was seen, as Dr. Franklin said, as "a point of great importance." 1 *Farrand* 65.

In this respect the Executive differs from the other two great branches of government. The legislative power is vested by Article I in "a Congress of the United States," divided into two bodies and composed now of 535 members. The judicial power is, by Article III, spread among the nine Justices of this Court and the hundreds of judges of the inferior courts that Congress has seen fit to ordain and establish. But one person, and one person alone, is entrusted by Article II with the awesome task of exercising the executive power of the United States. "The President is the Executive Department." This difference, as we shall develop below, has important consequences. It serves to distinguish many of the cases relied on by the Special Prosecutor, involving as they do individual

members of the legislative and judicial branches. Specifically, the particular position the President occupies in our constitutional scheme means that the courts cannot issue compulsory process to compel him to exercise powers entrusted to him in a certain way, that, so long as he is President, he is not subject to criminal process, and that, as a logical corollary, he may not, while President, be named as an unindicted co-conspirator.

Of course, as we have already pointed out (Pres. Br. 52 n. 45), the Framers did not want a king, and Hamilton devoted all of the 69th *Federalist* to demonstrating that the Presidency, as created in the Constitution, bore no resemblance to the monarchy from which the colonists had successfully rebelled. The term of the President is limited to four years. The legislative branch controls the national purse strings, the war power, and the general policy direction of government. The President is given only a limited veto, subject to being overridden, over legislative acts. He is given no role whatever in the process of constitutional amendment. Finally, and most important for present purposes, the President may be removed from office by conviction on impeachment, and after he has left office, either through expiration of his term or by conviction on impeachment, he is subject to prosecution for crimes that he may have committed.

We have already developed in detail the process by which the impeachment provisions of the Constitution took form. (Pres. Br. 95–104). The language of Article I, section 3, clause 4, can hardly be read in any other

way than that indictment of a President can only follow his conviction on impeachment. This was certainly the understanding of the delegates at Philladelphia, of the contemporary expositors of the Consttitution, and of students of constitutional law from 1787 until today.

There is nothing in *United States* v. *Isaacs*, 493 F. 2d 1124 (7th Cir. 1974), *cert. denied* —— U.S. ——, (June 17, 1974), that is contrary to what we have just said. A judge of a court of appeals is not the judicial branch. He is a part of that branch, but the Judiciary can function uninterrupted during those rare occasions when a single judge is forced to stand trial on a criminal charge. The Presidency cannot function if the President is preoccupied with the defense of a criminal case, and the thought of a President exercising his great powers from a jail cell bogglees the mind.[26]

The President, as we have noted, *is* the Executive Department. If he could be enjoined, restrained, indicted, arrested, or ordered by judges, grand juries, or marshals, these individuals would have the power to control the executive branch. This would nullify the separation of powers and the co-equality of the Executive.

The conclusion that the President is not subject to indictment while in office is consistent also with a proper ordering of government. When this principal national leader, elected by all of the people, is to be

[26] It is also worthwhile noting that at the Convention the discussion of impeachment was wholly in terms of a remedy against the President. Berger, *Impeachment: The Consttitutional Problems* 100 (1973). The inclusion in Article II, section 4, of the "Vice President, and all Civil Officers of the United States" was made without discussion in the closing hours of the Convention. 2 *Farrand* 575.

removed, it is proper that the removal be considered and accomplished only by a body that, like the President, is politically representative of the whole Nation. Impeachment is a process designed to deal with the problem of criminal conduct by the President and yet still preserve the majoritarian character of the Republic. Criminal indictments or judicial orders cannot provide the tools to remove or limit a whole branch of government, and were not contemplated by the Founders for such a purpose. Only the branch of government that represents the people who elected the President, the legislative branch, can take actions that will in any way remove or tend to remove a President from office. This is the function of Congress, not of a grand jury.

For reasons that we have already fully developed (Pres. Br. 107–115), it follows *a fortiori* from the non-indictability of an incumbent President that he cannot be named as an unindicted co-conspirator, and that the action of the grand jury in this case must be ordered expunged. The ability of a President to function is severely crippled if a grand jury, an official part of the judicial branch, can make a finding that a President has been party to a criminal conspiracy and make this in a form that does not allow that finding to be reviewed or contested and disproved.[27] To allow this would be a mockery of due process and would deny to Presidents of the United States even those minimal protections that the Constitution extends to

[27] And to suggest that the naming of a President as a criminal co-conspirator, even if unindicted, is not an "impeachment" of the President is, we submit, to play games with common words and common sense.

prison inmates subject to disciplinary proceedings. *Wolff* v. *McDonnell*, —— U.S. ——, No. 73-679 (June 26, 1974).

If the grand jury had before it evidence, competent or otherwise, *United States* v. *Calandra*, 414 U.S. 338 (1974), that led it to think that the President had been party to a crime, its only permissible course of action was to transmit that evidence to the House Judiciary Committee, rather than to make a gratuitous, defamatory, and legally impermissible accusation against the President.

Presumably the Special Prosecutor advised the grand jury to make this finding, and did so with the thought that it would strengthen his hand in litigation such as the present case (P.S.A. 8). If the President could be considered a co-conspirator, then all of his statements would arguably come within the exception to the hearsay rule and would meet the requirement of Rule 17(c) that subpoenaed material must be evidentiary in nature. In addition, this impermissible finding is relied on by the Special Prosecutor for his argument (S.P. Br. 90–102) that executive privilege vanishes if there is a *prima facie* showing of criminality. But even if the grand jury were empowered to make this finding—and as a matter of law it cannot—we have already shown that an allegation of criminal activity does not overcome the assertion of presidential privilege (Pres. Br. 82–86), and that a grand jury finding, based as it is only on a showing of probable cause, falls far short of the *prima facie* showing of

criminality that is required to defeat even the usual evidentiary privileges. (Pres. Br. 115–122.)[28]

The Special Prosecutor makes the surprising suggestion that the President enjoys no privileges or immunities.

> One might infer quite plausibly from the specific grant of official privileges to Congress that no other constitutional immunity from normal legal obligations was intended for government officials or papers. (S.P. Br. 77).

But it is quite clear that the privileges given to individual members of the legislative branch by Article I,

---

[28] The cases relied on by the Special Prosecutor (S.P. Br. 98) are not to the contrary. Such cases as *Ex parte United States*, 287 U.S. 241, 250 (1932), *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, 599 (1950), and the others cited stand only for the proposition that a grand jury indictment conclusively establishes that there is probable cause to hold the person named for trial. They do not hold that the grand jury's action is an evidentiary showing of a *prima facie* case.

Again the Special Prosecutor is not helped by *United States* v. *Aldridge*, 484 F. 2d 655, 658 (7th Cir. 1973); *United States* v. *Bob*, 106 F. 2d 37 (2d Cir. 1939), *cert. denied*, 308 U.S. 589 (1940); or the other cases he cites with regard to attorney-client privilege. In those cases the privilege was held to vanish only after the government by proof at trial, had made a *prima facie* showing of criminal involvement.

Finally, the Special Prosecutor's heavy reliance on *Clark* v. *United States*, 289 U.S. 1 (1933) (S.P. Br. 95–97, 100–101, 108–109), is misplaced. Quite aside from the very different nature of the "privilege," or, more properly, rule of competency, there in issue, Justice Cardozo was quick to point out that "[i]t would be absurd to say that the privilege could be got rid of merely by making a charge of fraud," 289 U.S. at 15, and that "there must be a showing of a *prima facie* case sufficient to satisfy the judge that the light should be let in." 289 U.S. at 14.

section 6, were given them for a specific and well-understood purpose. This was to protect the legislators "against possible prosecution by an unfriendly executive and conviction by a hostile judiciary . . ." *United States* v. *Johnson,* 383 U.S. 169, 179 (1966). It was "designed to assure a co-equal branch of government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch." *Gravel* v. *United States,* 408 U.S. 606, 616 (1972).

The Executive needed no protection from himself. As chief of state, chief executive, commander-in-chief, and chief prosecutor, he had no need to fear intimidation by a hostile executive or prosecution by an unfriendly executive. In addition, he was protected further by the elaborate procedure for impeachment, and by his immunity from criminal process until he had been convicted on impeachment. Thus the Constitution says nothing about immunities of the Executive comparable to what it says about members of the legislative branch because to have done so would have been to guard against an evil that could never come to pass.

Even members of the executive branch do have to fear damage actions brought by private citizens, and this Court has not been slow to read into the Constitution an implied immunity to protect the Executive in this situation. The leading case is *Spalding* v. *Vilas,* 161 U.S. 583 (1896), frequently relied on in this Court and always with approval. E.g., *Barr* v. *Matteo,* 360

U.S. 564, 570 (1959);[29] *Scheuer* v. *Rhodes,* 413 U.S. 919, 927 n. 8 (1974).

The Special Prosecutor would have the Court believe that the discretion about production of documents, which it has always been recognized that Presidents have, shrinks to a mere ministerial duty to produce what is demanded whenever a court disagrees with the Chief Executive's assessment of what the public interest requires. The argument seems little more than a play on words, intended to avoid the decisions, from *Marbury* on, that the courts may compel ministerial

---

[29] In the *Barr* case this Court relied heavily, in discussing immunity for executive officers, on the well-known opinion of Judge Learned Hand in *Gregoire* v. *Biddle,* 177 F. 2d 579 (2d Cir. 1949), where judicial immunity was at issue. Several of Judge Hand's insights in that case are applicable here. Thus he says:

> it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him . . . (177 F. 2d at 581).

Again Judge Hand observed that "[t]here must indeed be means of punishing public officers who have been truant to their duties . . ." 177 F. 2d at 581. But the Constitution provides three sanctions against a truant President. He is subject to the political sanction of being defeated for reelection and to the legal sanctions of conviction on impeachment and of criminal punishment after he has been removed from office.

acts but that they cannot interfere with discretionary decisions of high executive officers.

Nothing could be clearer than that the decision to disclose or to withhold the most intimate conversations of the President with his chief advisers involves the gravest and most far-reaching possible considerations of public policy. Who can say what the long term, or even short term, public effects of the President's decision to make public transcripts of tapes of his conversations about Watergate will be? It was a difficult and monumental decision, and no man living can predict with assurance how ultimately the history of this country, and indeed of the world, may be influenced by it. It was a discretionary decision in the most important sense, and it is nonsense to call such a disclosure "ministerial" merely because the final action of disclosure can be accomplished by a messenger.

A presidential decision to release the confidential tapes or written memoranda of his meetings with his advisers involves the same basic discretion as his initial decision to make such records. Surely neither the courts nor Congress could require Presidents to make such recordings on the ground that they would then be available should there be charges of misconduct against aides to some future President.

This case must be viewed in the light that the President is the executive branch, co-equal to the multi-membered legislative and judicial branches. If that co-equality is to be preserved, the President cannot be subject to the vagaries of a grand jury nor deprived of his power to control disclosure of his most confi-

dential communications. If he misuses his great powers, he must be proceeded against by the remedy that the Constitution has provided.

V. THE SPECIAL PROSECUTOR HAS NOT DEMONSTRATED A UNIQUE AND COMPELLING NEED FOR THIS MATERIAL

The Special Procecutor makes the casual suggestion that "[t]here is a compelling public interest in trying the conspiracy charged in *United States* v. *Mitchell,* et al., upon all relevant and material evidence." (S.P. Br. 107). Doubtless every prosecutor in history has thought the same thing. The genius of the law, happily, has rejected that course, and in this case the Special Prosecutor's suggestion begs every important question before the Court. A prosecutor has the right to every man's evidence "except for those persons protected by a constitutional, common-law, or statutory privilege." *Branzburg* v. *Hayes,* 408 U.S. 665, 688 (1972). If, as we have argued, the materials at issue are subject to a valid privilege, based both on the Constitution and on the common law, the Special Prosecutor may not have them, no matter how relevant or material he thinks they may be, any more than he could require the defendants in this case to produce relevant and material evidence based on what they told their attorneys or based on confidential communications with their wives.

Our argument, of course, has been that the great question is, as Judge Wilkey put it, "Who Decides?", and that the answer to that question is that the President decides. But even if we are wrong on that, and

the courts play a limited role under unusual circumstances, as held by the majority in *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973), the showing made by the Special Prosecutor falls far short of the requirements that the court of appeals announced in that case. The court there used the terms "critical," 487 F. 2d at 706, "peculiarly necessary," 487 F. 2d at 717, and evidence "for which no effective substitute is available," 487 F. 2d at 717, to describe the grand jury's need for the tapes there under subpoena. We predicted in our initial submission that the Special Prosecutor could make no similarly compelling showing in this case (Pres. Br. 86–95), and his brief has confirmed that fact. There is not one statement in the Special Prosecutor's Brief that suggests or even implies that if he is unable to obtain the material sought, the prosecution of this case will not be successful.[30]

The Special Prosecutor claims "that the 'unique' circumstances which led to the rejection of the President's claim of privilege in the context of a grand jury investigation have continued applicability." (S.P. Br. 107–108) He, of course, finds it convenient to ignore other salient portions of the opinion in *Nixon* v. *Sirica*

[30] It is significant that on June 3, 1974, Charles W. Colson pleaded guilty to the felony of obstructing justice, 18 U.S.C. § 1503, in the case of *United States* v. *Ehrlichman, et al.*, (D.D.C. Cr. No. 74–116) and subsequently all other charges against him were dismissed. Thus, assuming *arguendo* the Special Prosecutor does have a need for the subpoenaed items, the fact that Colson is no longer a defendant, certainly diminishes considerably, if not obviates completely, any need the Special Prosecutor may have ever had for subpoenaed items numbered: 1, 4, 5, 6, 13 and 17.

that are adverse to his position. It must be remembered that the court of appeals went to great lengths in that case to limit its holding "strictly to that required by the precise and entirely unique circumstances of the case," 487 F. 2d at 705, and specifically acknowledged that "we have attempted to decide no more than the problem before us—a problem that takes its unique shape from the grand jury's compelling show of need." 487 F. 2d at 722.

The Special Prosecutor cites *Committee for Nuclear Responsibility* v. *Seaborg*, 463 F. 2d 788 (D.C. Cir. 1971), to illustrate the possible consequences of not overcoming a privilege. (S.P. Br. 108). For "[o]therwise the head of an executive department would have the power on his own say-so to cover up *all* evidence of fraud and corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law." 463 F. 2d at 794. (emphasis added). But such a consequence is obviously not possible in our present situation[31] where the President has already permitted his closest aides and advisors to give public and grand jury testimony. In addition, voluminous documents and materials have been submitted to

[31] This fact is conceded by the Special Prosecutor, who in order to support his waiver theory freely admits that the President has "authorized voluminous testimony and other statements concerning Watergate-related discussions and his recent release of 1216 pages of transcript . . ." (S.P. Br. 116–117), and that "there has been extensive testimony in several forums concerning the substance of the recorded conversations now sought for use at the trial in *United States* v. *Mitchell, et al.*" (S.P. Br. 118–119).

the Special Prosecutor, to the congressional committees investigating Watergate, and to the public at large. As a result, grand jury indictments have been returned, and a number of convictions have already been obtained. There can be no valid assertion that if the privilege is not overcome in the present case, the consequences stated in *Seaborg* would result. The *Seaborg* case, rather than supplying reasons for overcoming the privilege in this case, illustrates the absence of any reason for doing so.

We have previously argued that the Special Prosecutor has failed to satisfy the requirements of Criminal Rule 17(c) for subpoenaed material. (Pres. Br. 122–133). We continue to believe that. Although in general we do not disagree with the propositions of law advanced by the Special Prosecutor on this issue,[32] we take serious issue with his application of the law to the facts of this case, and particularly to his attempt, implicit in his discussion of the facts, to shift

[32] We do take issue with the suggestion that the subpoena upheld in *Bowman Dairy Co.* v. *United States*, 341 U.S. 214 (1951), was much less particular than the subpoena in the present case. (S.P. Br. 126). The subpoena in *Bowman* was specifically limited to the documents, books, records, and objects "which were either presented to the grand jury or would be offered as evidence at trial." 341 U.S. at 217. This was a much more particularized showing of relevance and admissibility than the Special Prosecutor has made.

His reference to *United States* v. *Carter*, 15 F.R.D. 367, 371 (D.D.C. 1954), for the proposition that Rule 17(c) reaches materials useful for impeachment (S.P. Br. 128) is misleading, since that case, and many others we have cited (Pres. Br. 130), hold that impeachment materials cannot be obtained in advance of trial and one must wait to see if the person in question actually testifies.

the burden on the issue of relevancy to the President. The Special Prosecutor is seeking the materials. He must show that the documents are evidentiary and relevant. It is not for the President to prove that they are not.

But even if there is enough in the Special Prosecutor's conclusory statements to turn the color of legal litmus paper with regard to Rule 17(c), in its application to ordinary documents, he has failed to show the critical and compelling need that is required to overcome a claim of presidential privilege even under what we think to be the too permissive standard of *Nixon* v. *Sirica*.

CONCLUSION

Two years of Watergate have left their mark on America. Apart from its impact on the lives of the many men and women involved in the events, Watergate will affect practices, attitudes, and values in our political life in ways that are diverse and lasting and, it is to be hoped, for the good. Without the passage of another law or the imposition of another sentence Watergate will have wrought a great change in American life. But the processes of the law that have been set in motion by that set of events must run their course. What remains to be seen is whether the tides that surge about Watergate will alter the relationship among the branches of government; whether, in short, the complex and sensitive balance of our constitutional structure will be impaired.

Our last word is therefore essentially a neutral one. In choosing this closing note we do not abandon our

expectations for success or our conviction that we are right. We simply recognize that there has been enough argument about the powers and privileges of particular individuals who happen to occupy high office in the three branches and exercise their authority temporarily and in a representative capacity. For in the final analysis it is the Constitution we are all analyzing, arguing, expounding, and, in a sense of mutuality, undertaking to protect for the long life of the Nation.

In this setting the terminal question is: What decision best defends the constitutional structure of American government? What decision lifts the resolution of this case above the passions of this moment in history and safeguards the strengths and intergrity of the Constitution against the exigencies of an unknown and unknowable future? There is no doubt about the power, indeed the responsibility, of the Court to answer justiciable questions that are appropriately posed about the meaning of the Constitution. Nor, in our submission, is there any question but that the central idea of the Constitution is the distribution of power among the separate branches and the resolution of controversy and disagreement by accommodation rather than confrontation. A constitution is a way of governing, not a set of codified specifications for the resolution of disputes among the sovereign branches. There are blank spaces on the constitutional canvas that must be left untouched if the Constitution is to bear the same creative relation to our future that it has to our past.

In our briefs, we and the Special Prosecutor have cited *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343

U.S. 579 (1952), to support conflicting arguments. We quote the opening words of Mr. Justice Frankfurter's concurring opinion, confident in the knowledge that they reflect beliefs we and the Special Prosecutor hold in common:

> Before the cares of the White House were his own, President Harding is reported to have said that government after all is a very simple thing. He must have said that, if he said it, as a fleeting inhabitant of fairyland. The opposite is the truth. A constitutional democracy like ours is perhaps the most difficult of man's social arrangements to manage successfully. Our scheme of society is more dependent than any other form of government on knowledge and wisdom and self-discipline for the achievement of its aims.
>
> * * * * *
>
> Rigorous adherence to the narrow scope of the judicial function is especially demanded in controversies that arouse appeals to the Constitution. The attitude with which this Court must approach its duty when confronted with such issues is precisely the opposite of that normally manifested by the general public. So-called constitutional questions seem to exercise a mesmeric influence over the popular mind. This eagerness to settle—preferably forever—a specific problem on the basis of the broadest possible constitutional pronouncements may not unfairly be called one of our minor national traits. An English observer of our scene has acutely described it: 'At the first sound of a new argument over the United States Constitution and its interpretation the hearts of Ameri-

cans leap with a fearful joy. The blood stirs powerfully in their veins and a new lustre brightens their eyes. Like King Harry's men before Harfleur, they stand like greyhounds in the slips, straining upon the start.' *The Economist,* May 10, 1952, p. 370.

The path of duty for this Court, it bears repetition, lies in the opposite direction. (343 U.S. at 593–594).

Respectfully submitted,

JAMES D. ST. CLAIR
MICHAEL A. STERLACCI
JEROME J. MURPHY
LOREN A. SMITH
JAMES R. PROCHNOW
EUGENE R. SULLIVAN
JEAN A. STAUDT
JAMES J. TANSEY
Attorneys for the President

Of Counsel
CHARLES ALAN WRIGHT
LEONARD GARMENT

The White House
Washington, D.C. 20500
Telephone Number: 456–1414

July 1, 1974

U.S. GOVERNMENT PRINTING OFFICE : 1974 O—552-478

MOTION FILED

JUN 21 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1766

UNITED STATES OF AMERICA,

Petitioner,

—v.—

RICHARD M. NIXON, President of the United States, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION

NORMAN DORSEN
New York University Law School
40 Washington Square South
New York, New York 10012

MELVIN L. WULF
JOHN H. F. SHATTUCK
American Civil Liberties Union
22 East 40th Street
New York, New York 10016

Attorneys for Amicus Curiae

TABLE OF CONTENTS

PAGE

Motion for Leave to File Brief *Amicus Curiae* 1

Brief *Amicus Curiae* of the American Civil Liberties Union 3

Interest of *Amicus* 3

Questions Presented 3

Summary of Argument 4

ARGUMENT 6

Introduction 6

I. The President is not above the law: he is subject to judicial process 7

II. The doctrine of executive privilege does not give the President unreviewable discretion to withhold evidence in this or any other case 12

A. Judicial Precedents Do Not Support the President's Claim of Privilege 13

B. The Historical Record Does Not Support the President's Position 17

C. The Privilege Does Not Inhere in the Doctrine of the Separation of Powers 19

III. Executive privilege cannot be invoked to defeat a subpoena for documentary material when there is substantial evidence that it relates to a crime 21

CONCLUSION 27

PAGE

TABLE OF AUTHORITIES

Cases:

Application of Spiro T. Agnew, Civil No. 73-965 (D. Md.) 11

Branzburg v. Hayes, 408 U.S. 665 (1972) 22

Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788 (D.C. Cir. 1971) 14, 27

Environmental Protection Agency v. Mink, 410 U.S. 73 (1973) 17, 23

Ethyl Corporation v. Environmental Protection Agency, 478 F.2d 47 (4th Cir. 1973) 23

Gravel v. United States, 408 U.S. 606 (1972) 24

Grosjean v. American Press Company, 233 U.S. 245 (1936) 26

Grumman Aircraft Engineering Corporation v. Renegotiation Board, 482 F.2d 710 (D.C. Cir. 1973) 23

Marbury v. Madison, 5 U.S. (1 CRANCH) 137 (1803) 7, 10, 13

Myers v. United States, 272 U.S. 52, 293 (1926) 9, 20

Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) 14, 15, 17, 19, 27

New York Times Company v. Sullivan, 376 U.S. 254 (1964) 26

Prohibitions del Roy, 17 Eng. Rep. 1342 (1608) 11

PAGE

Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971) 22

United States v. Brewster, 408 U.S. 501 (1972) 24

United States v. Burr, 25 Fed. Cas. 30 (No. 14692d) (C.C.D. Va. 1807) 8, 9, 10, 16, 19

United States v. Clark, 289 U.S. 1 (1933) 25

United States v. Lee, 106 U.S. 196 (1882) 11

United States v. Reynolds, 345 U.S. 1 (1953) 16, 17, 21

United States v. United States District Court, 407 U.S. 297 (1972) 6, 10

Wood v. Georgia, 370 U.S. 375 (1962) 26

Youngstown Sheet & Tube Company v. Sawyer, 343 U.S. 579 (1952) 6, 7, 10, 15

Constitutional Provisions:

United States Constitution

First Amendment 5, 25, 26

Art. III, §1 10

Art. I, §6, ¶1 ..... 11, 24

Other Authorities:

4 THE WORKS OF JEREMY BENTHAM 320-21 (1843) 22

Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A. L. REV. 1043 (1965) 11, 18

BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974) 13, 23

Berger, *The President, Congress, and the Courts*, 83 YALE L. J. 1111 (1974) 9, 11

PAGE

CARPENTER, THE TRIAL OF COLONEL AARON BURR (1807) 8-9

Dorsen and Shattuck, *Executive Privilege, the Congress and the Courts*, 35 OHIO ST. L. J. 1 (1974) ..14, 21, 23

Frohnmayer, "An Essay on Executive Privilege" (ABA Samuel Pool Weaver Constitutional Law Prize Essay for 1974) reprinted in CONG. REC. 56603 (April 30, 1974) 19

4 LETTERS AND WRITINGS OF JAMES MADISON 340-350 (1867) 10

Rogers, Atty. Gen., Mem. Submitted to Subcomm. on Constitutional Rights of the Comm. on the Judiciary, United States Senate, 85th Cong., 2nd Sess. (1958), reprinted in 44 A.B.A.J. 941 (1958) 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1766

UNITED STATES OF AMERICA,

Petitioner,

—v.—

RICHARD M. NIXON, President of the United States, *et al.*,

Respondents.

Motion for Leave to File Brief *Amicus Curiae*

The attorneys for Richard M. Nixon having refused consent to the filing of this brief by the American Civil Liberties Union,* this Motion is filed pursuant to Rule 42.

The American Civil Liberties Union is a nationwide nonpartisan organization of more than 250,000 members devoted solely to the preservation of the liberties safeguarded by the Bill of Rights. For more than fifty years the ACLU has participated in hundreds of cases in this Court to advance individual liberties and to assure that governmental power is limited as required by the Constitution.

The case at bar involves profound issues concerning the power of the President to resist the processes of law. It is no exaggeration to state that this case presents the ques-

---

* The letter of consent from the Special Prosecutor has been filed with the Clerk of the Court.

tion whether the United States is a government of laws in which all citizens, including the President, are subject to the judicial process or whether the President can himself define the reach of the judicial and constitutional rules to which he is subject.

We believe that our brief, which examines the historical and judicial precedents concerning executive privilege, will be of substantial assistance to the court in the resolution of the issues in this case.

NORMAN DORSEN
Attorney for Movant

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1766

UNITED STATES OF AMERICA,
Petitioner,

—v.—

RICHARD M. NIXON, President
of the United States, *et al.*,
Respondents.

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION

Interest of *Amicus*

The interest of *Amicus* is set out in the preceding Motion for Leave to File.

Questions Presented

1. Whether the President, when he has assumed sole personal and physical control over evidence demonstrably material to the trial of charges of obstruction of justice in a federal court, is subject to a judicial order directing compliance with a subpoena *duces tecum* issued on the application of the Special Prosecutor in the name of the United States.

2. Whether a federal court is bound by the assertion by the President of an absolute "executive privilege" to withhold demonstrably material evidence from the trial of charges of obstruction of justice by his own White House aides and party leaders, upon the ground that he deems production to be against the public interest.

3. Whether a claim of executive privilege based on the generalized interest in the confidentiality of government deliberations can block the prosecution's access to evidence material and important to the trial of charges of criminal misconduct by high government officials who participated in those deliberations, particularly where there is a *prima facie* showing that the deliberations occurred in the course of the criminal conspiracy charged in the indictment.

Summary of Argument

I

The President, like other citizens, is not above the law. It is the duty of the courts to determine what the law is and the obligation of every citizen to obey it. The Constitution contains no express privilege or immunity which places the President beyond the reach of compulsory judicial process, nor can one be inferred from the doctrine of separation of powers. For more than a century and a half the courts have reviewed the actions of all three branches of government, including actions by Presidents beyond their statutory or constitutional authority. Indeed, the tradition of holding the Executive accountable for his acts extends deep into our constitutional history, the English Crown having long been held to be subject to the process of the courts.

II

Since the acts of the President are subject to constitutional limitation and judicial review, the President has no authority solely in his discretion to withhold material evidence from a judicial proceeding, particularly a criminal trial. This Court and others have on several occasions reviewed claims of executive privilege to withhold information "in the public interest", while no court has ever recognized an absolute privilege of the kind advanced by the President in this case. Nor does the historical record, despite its ambiguities, support the President's position. Finally, the separation of powers is based not on isolation but on interaction of the three branches of government, each being subject to the checks and balances of the other two.

III

Whatever privilege concerning advisory communications may attach to the office of the presidency, it does not shield the occupant of that office from producing documentary material when there is substantial evidence that it relates to a crime. The unofficial acts of a President, such as conducting a political campaign or otherwise acting outside the scope of his official duties, certainly are not shielded from the scrutiny of a criminal proceeding. This Court has twice held in recent years that an explicit constitutional privilege protecting the speech or debate of Members of Congress may not be used to block criminal investigations, and it must now reject an assertion of presidential privilege with no similar constitutional basis but having the same result. Finally, the public has a right, derived in part from the First Amendment, to obtain evidence relating to pos-

sible crimes committed by high elected officials, whom this Court has held necessarily enjoy fewer privileges than ordinary citizens in a representative democracy.

ARGUMENT

Introduction

There have been few comparable occurrences when this Court has been called upon to reaffirm a bedrock constitutional principle on which our society rests. The closest case is *Youngstown Sheet & Tube Company* v. *Sawyer*, 343 U.S. 579 (1952), where a President beset by heavy responsibility and an ongoing war, sought in manifest good faith to assure needed supplies of steel in order to protect American lives and property and to advance American foreign policy objectives. In a decision that has grown in stature and impact with the years, the Court rejected proffered theories of Executive "inherent power" and reasserted the Rule of Law as it applied to the President even in time of national emergency. See also *United States* v. *United States District Court*, 407 U.S. 297 (1972).

The case at bar presents comparable questions concerning the supremacy of law, although in a different legal and political context. As in the *Youngstown* case, there is no need to consider, much less impugn, the good faith of the President in order to insist with the utmost gravity that attempts to elevate the office of the President above the law as defined by this Court must be decisively rejected. The issue does not depend upon one's view of the current controversy embroiling the nation. It turns on the absolute necessity to preserve the constitutional balance. As Mr. Justice Jackson, concurring in *Youngstown*, observed:

"With all its defects, delays and inconveniences, men have discovered no techniques for long preserving free government except that the Executive be under the law and that the law be made by parliamentary deliberation." 343 U.S. at 655.

I.

The President is not above the law: he is subject to judicial process.

The fundamental issue raised in this case is whether the President, acting in his sole discretion, can disregard an obligation imposed on all other citizens to produce evidence demonstrably material to the trial of criminal charges of obstruction of justice in a federal court. Although the Constitution protects citizens from certain lines of inquiry and methods of gathering evidence in a criminal proceeding, the President does not invoke these protections; rather, he asserts an absolute immunity from any form of legal process.

There is no proposition more dangerous to the health of a constitutional democracy than the notion that an elected head of state is above the law and beyond the reach of judicial review. This proposition, currently advanced by the President, is a frontal attack on the elementary principle set forth by Chief Justice Marshall in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803): "It is emphatically the province and duty of the judicial department to say what the law is."

It is a basic premise of our constitutional government that the judiciary is to determine what the law is and that every citizen is subject to the law. It is inconceivable that

a sweeping presidential immunity should arise merely out of implications drawn from custom, untried in the courts; in fact, no such custom exists. Equally basic to the Constitution is the idea that the Executive Branch must be subject to continuing scrutiny, lest, being the most powerful and vigorous, it encroach on the other branches. James Wilson expressed this sentiment to the Pennsylvania Ratification Convention:

> The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence or inattention; he cannot roll upon any other person the weight of his criminality . . . Add to all this, that officer is placed high, and is possessed of power far from being contemptible; yet not a *single privilege* is annexed to his character. 2 Elliot 480 (emphasis supplied).

Had the Framers intended to deviate from these principles of constitutional government, or had they wanted to grant novel immunities and privileges, they would have done so plainly and clearly. But nowhere in the Constitution of the United States is the President granted immunity from legal process.

There is ample precedent that the President must submit to compulsory process of the courts. In *United States* v. *Burr*, 25 Fed. Cas. 30 (No. 14692d) (C.C.D. Va. 1807), Chief Justice Marshall ruled that a subpoena may be directed to the President. "That the President . . . might be subpoenaed and called upon to produce any paper which is in his possession, is not controverted, indeed that has once been decided." T. Carpenter, The Trial of Colonel

Aaron Burr 37 (1807), cited in Berger, *The President, Congress, and the Courts*, 83 Yale L.J. 1111, 1117 (1974). Even counsel for President Jefferson in the *Burr* case admitted, "We do not think that the President is above legal process . . . . and if the president possesses information of any nature which might tend to serve the cause of Aaron Burr, a subpoena should be issued to him, notwithstanding his elevated position." *Id.* at 75. George Hay, the United States Attorney in the *Burr* case, said:

> I never had the idea of clothing the President . . . . with these attributes of divinity . . . . That high officer is but a man; he is but a citizen; and, if he knows anything in any case civil or criminal, which might affect the life, liberty, or property of his fellow citizens . . . . it is his duty to . . . . go before a Court, and declare what he knows. *Id.* at 90-91.

Nor does the tripartite separation of powers imply presidential immunity from judicial process. As Mr. Justice Brandeis observed, dissenting in *Myers* v. *United States*, 272 U.S. 52, 293 (1926):

> The Doctrine of Separation of Powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

The Constitution provides that: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time

to time ordain and establish." U.S. CONST. art. III, §1. To hold that the President is immune from judicial scrutiny would deny this express delegation of the judicial power to the courts; to base such a holding on the doctrine of separation of powers would defeat the purpose for which the doctrine was designed.[1]

Furthermore, if the notion of Presidential immunity is to be gleaned from the separation of powers, there are no grounds for distinguishing presidential claims of immunity from the claims of any other officer in the Executive or Legislative Branch. If immunity from judicial process is a necessary element of the doctrine of separation of powers, then a judicial order directed to a lesser executive officer or to an officer of the Congress would prove no less an interference. Yet, for the past century and a half, in the exercise of their duty "to say what the law is," courts have reviewed the actions of all three branches of government. In a variety of notable cases, courts have invalidated the actions of Presidents (or Cabinet officers acting under presidential orders) as beyond their statutory or constitutional authority, e.g., *Youngstown Sheet & Tube Company* v. *Sawyer,* 343 U.S. 579 (1952); *United States* v. *United States District Court,* 407 U.S. 297 (1972), and have compelled presidents to perform the ministerial obligations of their office, *Marbury* v. *Madison, supra,* as well as their duties as citizens, *United States* v. *Burr, supra.*

[1] As Madison observed: "It may always be expected that the judicial branch . . . will . . . most engage the respect and reliance of the public as the surest expositor of the Constitution, as well as in questions . . . concerning the boundaries between the several departments of the Government as in those between the Union and its members." 4 LETTERS AND WRITINGS OF JAMES MADISON 340-50 (1867).

Just as no grant of Presidential immunity can be inferred from the separation of powers, no other provision of the Constitution extends immunity from judicial process. While Senators and Representatives enjoy a limited immunity from inquiry concerning "Speech and Debate" on the floors of Congress, U.S. Const., art. I, §6, ¶1, the Constitution is silent as to any such privilege for the President. As Solicitor General Robert H. Bork recently stated: "Since the Framers knew how to, and did, spell out immunity, the natural inference is that no immunity exists where none is mentioned." Memorandum for the United States at 10, *Application of Spiro T. Agnew,* Civil No. 73-965 (D. Md.) cited in Berger, *The President, Congress, and the Courts,* 83 YALE L.J. 1111, 1125 (1974).

The long tradition of holding the President accountable for his acts is not limited to American constitutional history. Lord Coke in 1688 expressed the view, which was to dominate English political thought in the seventeenth century, that the King himself was "under . . . the laws." *Prohibitions del Roy,* 17 Eng. Rep. 1342 (1608). Nearly two centuries later this principle was being applied by the English courts to require the production of Crown documents relevant to civil as well as criminal litigation. For example, in an admiralty case involving a ship seized by British authorities in 1789, the shipowner was permitted to employ judicial process to obtain a secret order of the Privy Council relating to the Crown's seizure policy. In ordering production, the Court pointed out:

> In any cause where the Crown is a party, it is to be observed, that the Crown can no more withhold evidence of documents in its possession than a private person. If the court thinks proper to order the production of the documents, that order must be obeyed.

The Ship Columbus, 1 Collectanae Juridica 88, 92 (1789), cited in Berger, ***Executive Privilege v. Congressional Inquiry*** (Part II), 12 U.C.L.A. L. REV. 1287, 1294 (1965).

Summing up the constitutional history establishing judicial review of executive action, the Supreme Court in *United States* v. *Lee,* 106 U.S. 196, 220 (1882), rejected an argument similar to the President's claim in this case:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the government, from the highest to the lowest, are the creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

The Court should apply these settled principles to the case at bar.

II.

The doctrine of executive privilege does not give the President unreviewable discretion to withhold evidence in this or any other case.

The precise issue presented by the President's assertion of executive privilege is whether the President has implied authority to withhold evidence from the Special Prosecutor *solely in his discretion,* or whether his decision to do so is subject to constitutional limitation and judicial review.

A. *Judicial Precedents Do Not Support the President's Claim of Privilege.*

At the beginning, Chief Justice Marshall stated that, "[b]y the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 135, 165 (1803). The Chief Justice nevertheless recognized the authority of the judiciary to review all acts not explicitly committed by the Constitution to executive discretion and to determine for itself which issues are precluded from judicial review. Such a determination is "peculiarly irksome, as well as delicate," but the task is mandated by the Constitution. 5 U.S. at 168-170.

Most invocations of executive privilege have involved presidential refusal to supply information to Congress. But the issue raised in this case by the President's refusal to submit to the process of the courts with respect to the tapes sought by the Special Prosecutor should be treated in the same way as would a presidential refusal to supply such material to Congress. In both cases the central question is whether the President has an unreviewable power to withhold from another branch of government any information he deems privileged.

There is no need for the Court to address the broad question of whether or not the privilege which the President claims has some basis in law.[2] Rather, "the issue is whether

---

[2] Professor Raoul Berger maintains that "executive privilege . . . is a myth . . . , a product of the nineteenth century, fashioned by a succession of presidents who created 'precedents' to suit the occasion." R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 1 (1974). Berger searches the Constitution, history and laws and finds no such justification for executive privilege.

the President has the implied authority under the Constitution to withhold data from Congress [and the courts] *solely in his discretion*, or whether his decision to do so is subject to constitutional limitation and judicial review." Dorsen and Shattuck, *Executive Privilege, the Congress and the Courts*, 35 OHIO ST. L.J. 1, 11 (1974) (emphasis in original).[3]

The Supreme Court has not yet spoken squarely on the issue. But lower court rulings and statements by this Court reinforce the conclusion that the President cannot be the final arbiter of the so-called "executive privilege."

In *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F.2d 788, 793 (D.C. Cir. 1971), the Court of Appeals considered and rejected a claim of absolute privilege: "Any claim to executive absolutism cannot override the duty of the court to assure that an official has not exceeded his charter or flouted the legislative will." Following that decision, the Court of Appeals in *Nixon* v. *Sirica*, 487 F.2d 700, 713 (D.C. Cir. 1973), stated:

[3] President Nixon, while a Member of Congress, made the following point:

> I am now going to address myself to an issue which is very important. The point has been made that the President of the United States has issued an order that none of this information can be released to the Congress and that therefore the Congress has no right to question the judgment of the President in making that decision.
>
> I say that that proposition cannot stand from a constitutional standpoint or on the basis of the merits for this very good reason: That would mean that the President could have arbitrarily issued an Executive Order in the Meyers case, the Teapot Dome case, or any other case denying the Congress of the United States information it needed to conduct an investigation of the executive department and the Congress would have no right to question his decision.
>
> Any such order of the President can be questioned by the Congress as to whether or not that order is justified on the merits. Cong. Rec. 4783 (April 22, 1948).

> [C]ounsel for the President can point to no case in which a court has accepted the Executive's mere assertion of privilege as sufficient to overcome the need of the party subpoenaing the documents. To the contrary, the courts have repeatedly asserted that the applicability of the privilege is in the end for them and not the Executive to decide.

Judicial authority to compel evidence from the President is grounded in its power to issue mandatory orders to officers of the Executive Branch. Issuance of such orders has, on occasion, required a determination of the limits of the President's authority under the Constitution. Mr. Justice Frankfurter, concurring in *Youngstown Sheet and Tube Company* v. *Sawyer*, 343 U.S. at 596, pointed to the necessity of such a determination: "To deny inquiry into the President's power in a case like this, because of the damage to the public interest to be feared from upsetting its exercise by him, would in effect always preclude inquiry into challenged power, which presumably only avowed great public interest brings into action."

While the President himself is a party to this action, in *Youngstown* the Secretary of Commerce was the named defendant. This is obviously but a formal distinction. The decision in *Youngstown* effectively restrained the President; it affirmed a District Court order enjoining an action ordered by President Truman claimed to be authorized by the Constitution. As the Court of Appeals noted in *Nixon* v. *Sirica*, 487 F.2d at 709: "[T]he practice of judicial review would be rendered capricious and very likely impotent—if jurisdiction vanished whenever the President personally denoted an executive action or omission as his own."

The extent to which the *Burr* case recognizes a right of "executive privilege" is currently being debated. There is no doubt, however, that the decision rejects the claim of discretionary presidential power of the kind advanced here. In his opinion Chief Justice Marshall stated:

> Whatever difference may exist with respect to the power to compel the same obedience to the process, as if it had been directed to a private citizen, there exists no difference with respect to the right to obtain it. The guard, furnished to this high officer to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after these subpoenas have issued, not in any circumstance which is to precede their being issued. *United States* v. *Burr,* 25 Fed Cas at 34.

Thus, while the President should be protected from harassment, his protection emanates from the courts: the office of the Presidency—although the highest and most powerful in the land—is not itself a shield from judicial process, nor should it be in any government of laws.

In *United States* v. *Reynolds,* 345 U.S. 1 (1953), where there was a conceded need to protect the Executive from potentially damaging effects flowing from the possible discovery of military secrets, the Court held, "the [trial] court itself must determine whether the circumstances are appropriate for the claim of privilege . . . ," 345 U.S. at 8, because "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Id.* at 9-10. Even a compelling claim involving secret weapons, therefore, cannot provide immunity from the judicial process where the Constitution is silent.

While a claim of absolute Presidential immunity from judicial process has not been previously raised before this Court, there is a substantial body of law holding that the courts will require the production of departmental records and papers under appropriate circumstances, including copies of documents prepared for the President. One such case is *Environmental Protection Agency* v. *Mink,* 410 U.S. 73, 93 (1973), in which the Court stated that, pursuant to the Freedom of Information Act, the District Court "may order" an *in camera* inspection of unclassified documents to determine whether and to what extent they are subject to the requirements of the Act. Although the Court in *Mink* recognized, as it did in *Reynolds, supra,* that the national interest in safeguarding military secrets may bar certain documents and materials from discovery, whatever privilege exists results from the application of rules that are judicially or legislatively determined. There is, in short, no judicial support for the breathtaking claims of the President in this case.

B. *The Historical Record Does Not Support the President's Position.*

While the historical record is at times ambiguous, and therefore open to varying interpretations, compare *Nixon* v. *Sirica,* 487 F.2d 700 (majority opinion), with 487 F.2d at 731-37 (MacKinnon, J., dissenting), it emphatically does not sustain an unreviewable presidential power to withhold information from Congress or the courts.

One of the dissenting opinions in *Nixon* v. *Sirica,* 487 F.2d at 778, correctly points out that "[t]hroughout this nation's 184-year Constitutional history, Congress and the Executive have succeeded in avoiding any near-fatal con-

frontation over attempts by Congress to procure documents in the Executive's possession." The absence of such a clash indicates that presidents have refrained from asserting the extraordinary power that is claimed here. The pattern was set by President Washington, who at least once questioned the authority of Congress to demand documents, but eventually complied with congressional requests and never directly confronted Congress with a discretionary refusal to disclose. The one denial by Washington of a request for information—a demand by the House of Representatives for all papers relating to the negotiation of the Jay Treaty —was based on the President's correct conclusion that the House lacked power under the Constitution to demand information relating to the making of treaties. Washington conceded, however, that the Senate could receive the documents.[4]

It is true that during the early presidencies a congressional practice developed of extending to the President an implied "privilege" to withhold certain investigative reports and state secrets from public disclosure. Where the offer extended by Congress was accepted by the President and documents were withheld, however, the arrangement was generally recognized as an accommodation rather than the exercise of an unreviewable presidential power.[5] When Jefferson declined, for example, to produce certain information on the Burr conspiracy in 1807, he was acting upon a House request that expressly excepted "such [information] as he may deem the public welfare to require not to be disclosed."[6] This congressional accommodation, of course, did not exempt Jefferson from compulsory judicial process. See *United States* v. *Burr, supra.*

[4] See Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A. L. Rev. 1043, 1079-80, 1089-93 (1965).

[5] When this "accommodation" broke down, as it did on one occasion during the presidency of Andrew Jackson in 1835, Congress found it appropriate to apply sanctions against the Executive, by, for example, refusing to confirm a presidential nominee. *Id.* at 1095.

The historical record, therefore, is at best ambiguous and of no help in supporting the President's claims in this case. As one recent commentator has observed, the post-1787 precedents "bear all of the earmarks of their essential character as political compromises, and thus yield no unitary conception of the Constitutional basis of a privilege."[7]

C. *The Privilege Does Not Inhere in the Doctrine of the Separation of Powers.*

In the absence of historical or judicial support for the President's claim of unreviewable power to withhold information from the Congress and the courts, we turn again to the President's argument that such a privilege is necessary to protect the power of the Executive and is therefore required by the doctrine of separation of powers.

Proponents of the President's interpretation of the doctrine of separation of powers argue that if the judicial branch can "coerce" the Chief Executive into surrendering documents and records, "then the Chief Executive is no longer 'master in his own house.'" *Nixon* v. *Sirica*, 487 F.2d at 769 (Wilkey, J., dissenting). This argument is defective on several grounds.

[6] Quoted in Mem. of Atty. Gen. William Rogers, submitted to Subcomm. on Constitutional Rights of the Comm. on the Judiciary, United States Senate, 85th Cong., 2nd Sess. (1958), reprinted in 44 A.B.A.J. 941, 944 (1958).

[7] Frohnmayer, "An Essay on Executive Privilege" (ABA Samuel Pool Weaver Constitutional Law Prize Essay for 1974) reprinted in Cong. Rec. 56603 (April 30, 1974) (daily ed.).

First, it is equally true that if the Special Prosecutor cannot obtain evidence necessary and material to a criminal proceeding because the President asserts an unreviewable executive privilege, the judicial branch is not master in *its* house.

There is a broader perspective on the separation of powers issue. As Hamilton stated, each branch must be given "the necessary constitutional means and personal motives to resist encroachments of the others." Federalist No. 51 at 337. These means and motives preserve a dynamic balance between the three departments. Congress has the power to make appropriations, to vest jurisdiction in the courts and to determine the procedures by which they operate, and to impose legal duties on the Executive. The President has the power to veto congressional action and the power to appoint the officers of the judicial branch. The courts play their constitutional role by checking unconstitutional action on the part of any branch. Thus, *no* branch is entirely "master in its own house." Each branch is subject to checks and balances from the others, and the separation of powers depends on interaction, not isolation. See *Myers* v. *United States,* 272 U.S. at 293 (Brandeis, J., dissenting).

Furthermore, separation of powers was often seen by the Framers as a safeguard against encroachment by the *Executive.* Charles Pinckney, commenting on the express congressional privilege from arrest, said:

> . . . They [the Framers] well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should be exercised here . . . . Let us inquire why the Constitution should have been so attentive to each

> branch of Congress . . . and have shown so little to the President . . . In this respect no privilege of this kind was intended for our Executive, nor any except that which I have mentioned for your Legislature. 3 Farrand 385.

Having no foundation in law or history, and not being a necessary and explicit element of the doctrine of separation of powers, the President's claim to an unreviewable executive privilege to withhold data from Congress and the courts must be rejected as a dangerous fiction and inconsistent with the rule of law.

III.

Executive privilege cannot be invoked to defeat a subpoena for documentary material when there is substantial evidence that it relates to a crime.

If the President is subject to judicial process and "the court itself must determine whether the circumstances are appropriate for the claim of privilege . . . ," *United States* v. *Reynolds,* 345 U.S. at 8, the only remaining question is whether any such claim can withstand judicial scrutiny where the material sought is essential to a criminal prosecution. The only claim of privilege that has any arguable relevance to the subject of this case involves the President's asserted power to withhold materials relating to internal advice within the Executive Branch.[8] We urge that whatever privilege may attach to the office of the Presidency, it does not shield the occupant of that office from

[8] See Dorsen and Shattuck, *Executive Privilege, the Congress and the Courts,* 35 Ohio St. L.J. 1, 29-33 (1974).

producing documentary evidence essential to a criminal trial.[9]

The principle that every citizen has the duty to give evidence is fundamental in Anglo-American law. Mr. Justice White recently asserted ". . . the longstanding principle that the public . . . has a right to every man's evidence except for those persons protected by a constitutional, common law, or statutory privilege . . . ." *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972).[10] The President is not protected in this case by any such "constitutional" privilege. There is undoubtedly a principle to be served in protecting the internal decisionmaking process of each branch of government. The justification for this principle is that the development of public policy may be inhibited if individuals in government cannot rely on the confidentiality of their communicated opinions. See, e.g., *Soucie* v. *David*, 448 F.2d 1067, 1080-81 (D.C. Cir. 1971).

The proper scope of an "advice privilege" which may be asserted by the President, subject to judicial review, is as follows:

1. The privilege may be claimed (only by the President personally) with respect to recommendations, advice and

[9] The Court in this case need not decide what the constitutional privilege should be if (a) the President were subpoenaed personally, or (b) the evidence sought were not material to a fair trial.

[10] A footnote in Mr. Justice White's majority opinion in *Branzburg*, quoting from Jeremy Bentham, vividly illustrates why (408 U.S. at 688):

> . . . Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach while a chimney sweeper and a barrow-woman were in dispute about a halfpenny worth of apples, and the chimney sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly not. 4 THE WORKS OF JEREMY BENTHAM 320-21 (1843).

suggestions passed on by members of the Executive Branch acting under lawful authority for consideration in formulation of policy. See *Environmental Protection Agency* v. *Mink*, 410 U.S. at 85-89; *Ethyl Corporation* v. *Environmental Protection Agency*, 478 F.2d 47, 51-52 (4th Cir. 1973).

2. The privilege may not be asserted with respect to what has been *done*, as distinct from what has been advised. The President is accountable for his actions and for decisions that he has made leading to action by others. See, e.g., *Grumman Aircraft Engineering Corporation* v. *Renegotiation Board*, 482 F.2d 710, 718-19 (D.C. Cir. 1973).[11]

Whatever the effect of an "advice privilege" in other circumstances, there is no justification for confidentiality when there is substantial evidence that the communications at issue themselves may relate to a crime, such as obstruction of justice. "There is obviously an overriding policy justification for this position, since the opposite view would permit criminal conspiracies at the seat of government to be shrouded by the veil of an advice privilege." Dorsen and Shattuck, *Executive Privilege, the Congress and the Courts*, 35 OHIO ST. L.J. 1, 32 (1974).

This Court has recently underscored its impatience with claims of *explicit constitutional privilege*, based on the separation of powers, when that privilege is used to block investigations concerning "possible third party crimes."

[11] To the extent there is a privilege protecting certain aspects of the Presidency from public view, " . . . it should extend at most to official acts, not to unofficial acts of a candidate campaigning with the aid of a Reelection Committee that, according to testimony, sought to corrupt the election." R. Berger, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 261 (1974).

In *Gravel* v. *United States,* 408 U.S. 606 (1972), the Court held that Senator Gravel's assistant could be compelled to testify about the publication of the Pentagon papers, which Gravel himself had read on the Senate floor. Mr. Justice White, writing for the majority, stated that even the Senator could be interrogated by a grand jury if his sources of information related to crime, since the Constitution "provides no protection for criminal conduct threatening the security of the person or property of others . . . " 408 U.S. at 622.

A similar result was reached in *United States* v. *Brewster,* 408 U.S. 501 (1972), a case involving a claim of immunity by former Senator Daniel Brewster of Maryland, who was prosecuted for having received a bribe to influence his action on postal legislation. The Court of Appeals had held that the indictment was invalid because it put into question a Senator's constitutionally protected motives for legislative action, but the Supreme Court reversed on the ground that "[t]aking a bribe is, obviously, no part of the legislative process or function." 408 U.S. at 526.

Gravel and *Brewster* appear to foreclose any claim by the President that his taped conversations concerning alleged criminal activities in the White House are covered by a privilege for "advisory communications," because in those cases the Court was dealing with the *explicit* constitutional immunity granted by Article I, Section 6. But there is no such specific immunity based on executive privilege. It is, therefore, all the more plain that the privilege, whatever its reach, does not permit the President to withhold information concerning criminal conduct.

Similarly, it is plain that a common law privilege may be outweighed by the exigencies of a criminal prosecution. In *United States* v. *Clark,* 289 U.S. 1, 16 (1933), the Court held that upon showing of a prima facie case that a jury was tainted, the interest in confidential jury proceedings was outweighed by "the overmastering need, so vital in our polity, of preserving trial by jury in its purity against the inroads of corruption." The privilege fell and "the debates and ballots in the jury room" became admissible in evidence. 289 U.S. at 14. The indictment in the instant case of several parties to alleged conversations recorded on the tapes subpoenaed by the Special Prosecutor easily meets the *Clark* standard of a "prima facie showing."

On May 22, 1973, before the existence of the White House tapes became known, the President issued a statement which accurately and succinctly summarized the law: "Executive privilege will not be invoked as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in the matters under investigation." [12] This Court should hold the President to his earlier correct position.

Apart from the President's duty, in common with all citizens, to give evidence in a criminal proceeding, the public has a right to obtain the evidence, particularly when it relates to possible crimes committed by high elected officials. This right derives in part from the First Amendment, the primary purpose of which is to insure that citizens are informed about the activities of their government.

---

[12] New York Times, May 23, 1973.

It is axiomatic that a free flow of information is essential to democratic self-government.[13]

A corollary of this axiom is the duty of high elected officials, and the President in particular, to account fully to the electorate for their actions. As Mr. Justice Black emphasized, concurring in *New York Times Company* v. *Sullivan*, 376 U.S. 254, 257 (1964), "a representative democracy ceases to exist the minute that the public functionaries are by any means absolved from their responsibility to their constituents" (quoting Blackstone). Indeed, *Sullivan* affirmed the principle that elected officials enjoy fewer privileges than ordinary citizens. It is for this reason that the Court has pointed out that the First Amendment is rooted in the struggle "to establish and preserve the right of the English people to full information in respect to the doings and misdoings of their government." *Grosjean* v. *American Press Company*, 233 U.S. 245, 247 (1936).

While we realize that a criminal proceeding is not primarily a vehicle for informing the public, when the President withholds evidence needed for the prosecution, he frustrates the principle that when criminal charges are made, "society's interest is best served by a thorough and extensive investigation . . . " *Wood* v. *Georgia*, 370 U.S. 375, 392 (1962). As the Court of Appeals for the District of Columbia has stated, if an unqualified executive power to withhold information is sustained by the judicial branch, "the head of an executive department would have the power on his own say so to cover up all evidence of fraud and

[13] Among the many recognitions of this principle throughout our history is the statement by Patrick Henry that, "the liberties of the people never were . . . secure when the transactions of their rulers may be concealed from them." 3 Elliot 170.

corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law." *Committee for Nuclear Responsibility, Inc.* v. *Seaborg, supra*, at 794. See also *Nixon* v. *Sirica*, 487 F.2d at 714.

CONCLUSION

For the reasons stated above, the decision of the District Court should be affirmed.

Respectfully submitted,

NORMAN DORSEN
New York University Law School
40 Washington Square South
New York, New York 10012

MELVIN L. WULF
JOHN H. F. SHATTUCK
American Civil Liberties Union
22 East 40th Street
New York, New York 10016

Attorneys for Amicus Curiae

June 21, 1974